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ABSTRACT

The right of privacy as it relates to advertising and the use of a person's name or likeness is discussed in this paper. After an introduction that traces some of the history of invasion of privacy in court decisions, the paper examines cases involving issues such as public figures and newsworthy items, right of privacy waived, right of privacy precluded by consent, limits of consent, termination of employment, revocation, malice, sufficiency of identification, incidental use of name, and who may bring action against whom. A second section of the paper discusses usage of name or likeness as an invasion of privacy as it relates to endorsement of products or services, usage of name on a product, and recovery allowed and denied. A section is included on use of pictures for display purposes, in newspapers or other printed publications, in television or motion pictures, and mistaken use of pictures. A final section discusses usage of name or likeness in false light including misrepresenting of authorship or statements and alteration of pictures. Each section includes numerous references to court decisions. (TJ)

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ADVERTISING AND INVASION OF PRIVACY

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THE ROLE OF ADVERTISING AND THE RIGHT OF PRIVACY

by Daniel M. Rohrer

with Martin P. LoMonaco*

Introduction

Privacy and defamation are separate torts which share some common defenses. "Invasions of privacy and defamation are separate and distinct torts even though they share some of the same elements and often arise out of the same acts. The first is a cause of action based upon injury to plaintiff's emotions and his mental suffering; the second is a remedy for injury to plaintiff reputation. Invasion of privacy torts which require publication and defamation torts share a common defense of privileged communications which grant immunity to otherwise actionable publication," Froelich v. Adair, 213 Kan 357, 516 P2d 993 (1973).

Advertising comprises a broad field, as does the area of privacy. The pnumbra in which we find these involves use of the plaintiff's name or likeness. This area interrelates more between advertising and privac y, than defamation. Hence, we will concentrate on the former.

Here, the term "advertising purposes" will be conceptualized to include: (1) the use of a person's name or picture for all types of promotional endeavors, such as a photograph as part of an advertisement, a heading on the cover of a magazine, a name or picture as part of a program; or (2) the enhancement of reputation and commercial value for the purpose of increasing trade at the expense of the plaintiff who may be a competitor.

Exceptions will also be considered, as where a person's name or likeness was used in the context of an article published as a matter of public interest; where a partnership or corporation attempts action for invasion of privacy; where the plaintiff has consented to the use of his name or likeness; and where the use of a public figure in a publication is not viewed to be for promotional endeavors.

Limits on Use of Name or Likeness for Advertising or Trade Purposes

Introduction

Long ago, the law gave a remedy only for physical interference with life and property, and for trespass. Prior to 1890, every adjucated case involving a right

of privacy, in this country and in England, was not based upon the existence of such right, but was founded upon a supposed right of property, or a breach of trust or confidence. Hence, a claim to a right of privacy, independent of a property or contractural right, had until then never been recognized in any decision, Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 SE 68, 69 (1905).

Centuries' absence of precedent for an asserted right might reasonably cause the courts to proceed with caution, as recognizing that right might invade the province of the law making power. Absence alone, however, is not conclusive of the question as to the existence of the right, ibid.

Shortly before the turn of the 20th Century, Samual Warren and Louis Brandeis wrote that the right to life has come to mean the right to enjoy life,"...to be let alone...and the term 'property' has grown to comprise every form of possession--intangible, as well as tangible," 4 Harv LR 193 (1890). Warren and Brandeis cited a limited number of instances in which injunctions had been issued to enjoin certain invasions of privacy, ibid at 208, and they set forth new criteria which should be established to further restrict infractions upon individual privacy, ibid at 214-219.

Little more than a decade after the Warren-Brandeis article was published, the court of appeals heard its first test case on invasion of privacy, Roberson v. Rochester Folding-Box Company. Here the defendant made use of the picture of an attractive woman to advertise flour without her consent. In a close decision with a strong dissent, the court flatly denied the existence of any right to protection against such conduct, because of the lack of precedent; the purely mental character of the injury; the "vast amount of litigation" which might be expected to follow; the difficulty of drawing a distinction between public and private characters; and the fear of undue restriction of liberty of speech and freedom of the press, 171 NY 538, 64 NE 442.(1902). The court concluded that any such change in the law must rest in the hands of the legislature.

A wave of public disapproval, leading one of the concurring judges to take the unprecedented step of publishing a law review article in defense of the Roberson decision. In this article, Judge O'Brien argued that "we may assume that the press is

not always a safe guide for either the bar or the public upon legal question or with respect to the real scope and effect of judicial decisions." 2 Col. LR 437 (1902).

O'Brien's attempted defende of the decision was insufficient. Thus, enactment of a 1903 statute, now New York Civil Rights Law, §§ 50-51, prohibited the use of name, portrait or picture of any living person without his prior written consent for "advertising purposes" or for "purposes of trade". Similar statutes have been adopted in Virginia, Oklahoma, and Utah.

In order to find an actionable invasion of privacy under these statutes, the courts must first determine that the publication which the plaintiff finds objectionable falls within the meaning of the statute. The courts have tended to be liberal in their interpretation of what constitutes "advertising purposes" or "purposes of trade", as in the following cases where the publication was found to be for such purposes.

In Pavesich v. New England Life Ins. Co., a case which arose in Georgia only two years after the passage of the New York privacy law, the defendant's insurance advertising made use of the plaintiff's name and picture, as well as a spurious testimonial from him, 122 Ga 190, 50 SE 68 (1905).

The alleagations of the petition were that in an issue of the Atlanta Constitution newspaper, there appeared a likeness of the plaintiff, easily recognized by friends and acquaintances, placed by the side of an ill-dressed and sickly looking person. Above the likeness of the plaintiff were the words: "Do it now. The man who did." Above the likeness of the other person were the words:"Do it while you can. The man who didn't." Below the two pictures were the words: "These two pictures tell their own story." Under the plaintiff's picture the following appeared: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston Mass., and today my family is protected and I am drawing an annual dividend on my paid-up policies". Under the other person's picture was a statement to the effect that he had not taken insurance, and now he realized his mistake. The picture was made from the negative without the plaintiff's consent,

and the publication is peculariarly offensive to him. The statement attributed to the plaintiff in the publication is false and malicious. He never made any such statement, and has not, and never has had, a policy of life insurance with the defendant company, supra.

The petition contained two counts--one for libel, and the other for a violation of the plaintiff's right of privacy. With the example of the New York statute before it, the Georgia court in turn rejected the Roberson case, accepted the views of Warren and Brandeis, and recognized the existence of a distinct right of privacy. although there was no case precedent for this decision, and no Georgia law barring such invasions of privacy, in the words of the court, "the common law will judge according to the law of nature and the public good," supra.

Thus the first form of invasion of privacy to be recognized by the courts consists of the appropriation, for the defendant's benefit or advantages, of the plaintiff's likeness. Consequently, in New York, as well as in many other states, there are a great many decisions in which the plaintiff has recovered when his name or picture, or other likeness, has been used without his consent to advertise the defendant's product, or to accompany an article sold, to add luster to the name of a corporation, or for other business purposes, Prosser, Torts (1971), 805.

It is the plaintiff's name as a symbol of his identity that is involved here, and not as a mere name. When the defendant makes use of the name to pirate the plaintiff's identity for some advantage of his own does he become liable, ibid.

Pavesich was not only the first case to establish a right of privacy in advertising and promotional endeavors; it was also the first to set limits on such protection. These perimeters include public figures and newsworthy items, consent, malice, disclosure and other elements required for standing.

Public Figures as Newsworthy Items

A number of cases have held that a person who seeks public acclaim or has been thrust into the public limelight has waived his right of privacy to such a degree that

even the unauthorized use of his name or likeness for advertising purposes does not constitute an actionable claim upon which relief may be granted. In Pavesich, on the other hand, the court held that an artist is not necessarily a "public character", whose position or status might be sufficient to waive his right to privacy, so that his picture might be used for advertising purposes, supra. Before identifying a number of cases in which public personages have not been protected because they were viewed as newsworthy, several instances will be cited in which such rights have not been waived.

Right of Privacy Protected

In Spahn v. Messner the court of appeals upheld a lower court decision that a publication of a fictionalized biography of a well known baseball pitcher, in which the author invented dialogue, incidents, and thoughts, could not be justified on the grounds that these literary techniques were customary for children's books. The courts decision was based on knowing falsity and reckless disregard for the truth on the part of the plaintiff, a criterion which will be explicated later under the heading entitled "Impact of Malice". "To hold that this research effort entitles the defendants to publish the kind of knowing fictionalization presented here would amount to granting a literary license which is not only unnecessary to the protection of free speech but destructive of an individual's right--albeit a limited one in the case of a public figure---to be free of the commercial exploitation of his name and personality," 21 NY 2d 124, 233 NE 2d 840, 843 (1967).

Palmer v. Schonhorn Enterprises, Inc. involves an action by well-known professional golfers seeking an injunction and damages with respect to use of their names by the defendant corporation in conjunction with a part of a game. The court held that the defendant corporation, which used the names of Arnold Palmer, Gary Player, Doug Sanders and Jack Nicklaus in connection with a golf game, should not be permitted to commercialize upon such names merely because they had been so highly publicized. The mere fact that the plaintiffs' names were not advertised on the lids of the boxes, so

that the purchaser would not know who the "23 famous golfers" were until he purchased and saw the contents of the box, would not mean that the golfers' rights of privacy were not invaded, 96 NJ Super. 72, 232 A2d 458 (1967).

In the following cases the court concluded that while there may be some instances whereby public figures will not be protected from the commercial exploitation of their likeliness, at least in these cases the defendant is liable for appropriating name or likeness because proper consent had not been obtained: Harris v. I.W Gossard Co., 194 App Div 688, 185 NYS 861 (1921); Sidney v. AS Beck Shoe Corp., 153 Misc 166, 274 NYS 559 (1934); Sinclair v. Postal Tel. & Cable Co., 72 NYS2d 841 (1935); Kerby v. Hal Roach Studioa 53 Cal App 2d 207, 127 P2d 577 (1942); Jansen v. Hilo Packing Co., 202 Misc 900, 118 NYS2d 162, affd 282 App Div 935, 125 NYS2d 648 (1952); Birmingham Broadcasting Co. v. Bell, 259 Ala 656, 68 So 2d 314 (1953); Gieseking v. Urania Records, Inc., 17 Misc 2d 1034, 155 NYS 2d 171 (1956); Wilk v. Andrea Radio Corp., 200 NYS 2d 522, mod 13 App Div 2d 745. 216 NYS2d 662 (1960); Sharman v. C. SChmidt & Sons, Inc., 216 F Supp 401 (DC Pa 1963); Reilly v. Rapperswill Corp., 5o AD2d 342, 377 NYS2d 488 (1975).

Right of Privacy Waived

The court heard, in Clover v. Fox Publishing Co., the claim of a woman, under legal age, who for several years had been a professional entertainer in the specialty of "high diving". On one occassion a picture was taken of her wearing a costume appropriate to her public performances. A copy of this photograph came into the possession of the defendant who, without the written consent of the plaintiff, or her guardian or parents, published a reproduction of it immediately in its publication known as the National Police Gazette. Immediately below the picture appeared the words, "May Collier, A Great Trick Diver". On the same page appeared four other pictures of women vaudeville performers, attired in stage costumes. At the bottom of the page were the words: "Five of the Kind on This Page. Most of Them Adorn the Burlesque Stage, All of Them are Favorites with the Bald Headed Boys". Despite

her claim that this publication of her picture was a violation of sections 50 and 51 of the Civil Rights Law, the court decided otherwise. It rejected the proposition that the publication of her picture was a mere advertising sheet sold as a matter of trade. The court concluded that the statute fails to prohibit, under penalty of exemplary damages, a publication in a daily, weekly, or periodical paper or magazine of the portrait of an individual, 162 App Div 297, 146 NYS 999 (1914).

Dallesandro v. Henry Holt and Company, Inc. involves an action against the publishers of a book for violation of the Civil Rights Law of New York in displaying a picture on the cover showing the subject in conversation with the plaintiff. The court entered an order dismissing complaint and judgment because the picture illustrated an article on a matter of public interest. It therefore was not considered to have been for the purpose of trade or advertising within the prohibition of the statute. Unless it has no real relationship to the article, or unless the article is an advertisement in disguise, it would not be so. The court concluded that it makes no difference whether the article appears in a newspaper, magazine, television, motion picture, or in a book, 4 AD2d 470, 166 NYS 2d (1957).

In Jenkins v. Dell Publishing Co., Inc. the court held that the widow and children of a man who had been kicked to death by a gang of adolescents could not recover for invasion of their privacy by accurate factual accounting of the homocide in a detective magazine, illustrated with a photograph of the widow and children. It was published about three months after the homocide when the matter was still newsworthy.

The court argued that: "For the present purposes, news need be defined as comprehending no more than relatively current events such as in common experience are likely to be of public interest. In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongrous or ironic aspect...," 251 F2d 447 (1958).

Later in 1958 another complaint purports to allege two causes of action: (1) That defendants printed and published in Confidential a sordid article incorporating the plaintiff's name and photographs, without his consent, for the purpose of trade and for the primary purpose of amusing and astonishing the public and not for the legitimate purpose of disseminating the news or actual events. The second cause makes the same charges on behalf of the plaintif's wife. The court concluded that although a newspaper or magazine is published for profit, the use of a name or picture in such publications does not ipso facto fall within "purpose of trade" under the statute giving right of action for damages to person whose name, portrait, or picture is used for the purpose of trade without written consent being first obtained, "nor does the statute give a cause of action to those who through their own activities have become public figures", Goelet v. Confidential, Inc., 5 AD2d 226, 171 NYS2d 223 (1958).

Mahaffey v. Official Detective Stories, Inc. involves action by the parents of a boy, who was killed by a knife-wielding assailant, against the publisher and distributor of the magazine which contained an article relating events surrounding his death. The lower court held that the mother and father could not recover on the theory of deprivation of property right because the article was published for reader interest and not to promote or publicize a particular product or service. On appeal the case was dismissed, 210 F. Supp 251 (1962).

A well-known actress brought an action against the publisher of a magazine and its advertising agency for damages for an alleged invasion of her right to privacy in violation of the New York Civil Rights Statute. The Appellate Division held that where a photograph of the actress was properly published by the publisher in its magazine, and subsequently the publisher had the photograph republished in other magazines to advertise the publisher's magazine, the republication of the photograph was not a violation of her right to privacy in violation of the law, 15 AD2d 343, 223 NYS2d 737 (1962). The actress appealed, contending that it was undisputed that the publisher and its advertising agency had used her name and picture for advertising purposes without having first obtained her consent. She asserted that she was en-

titled to judgment as a matter of law, and that the fact that she was a public figure was no bar to her recovery. The court of appeals upheld the lower decision, Booth v. Curtis Publishing Co., 11 NY2d 907, 182 NE2d 736, 15 AD2d 343, 223 NYS2d 737 (1962).

In an action for invasion of the right of privacy, the court held that a plaintiff, who as a high school student had made important advances in radio communications and received considerable publicity in connection with this accomplishment, was not entitled to be compensated or to share in the profits of a textbook, intended for beginners and persons interested in radio generally, merely because his photograph was used as a frontispiece, followed by a brief summary of his achievements, Klein v. McGraw-Hill, Inc., 263 F. Supp 919 (1966).

From the cases described above, it is possible to extrapolate the conclusion that even the name or likeness of a public figure may be exploited at least to some extent for commercial purposes unless the nature of the exploitation becomes extreme. However, the clearest statement of the law relating to public figures appeared in a 1953 case involving an action for inducing breach of contract, Haelan Laboratories v. Topps Chewing Gum, 202 F. 2d 866 (CA2 1953).

The following cases further denied relief at least in part on the principle that the plaintiff had achieved a degree of public recognition and therefore was not entitled to recovery despite the fact that his name or likeness may have been used by another for promotional purposes: Harris v. HW Gossard Co., 194 App Div 688, 185 NYS 861 (1921); Sidney v. AS Beck Shoe Corp., 153 Misc 166, 274 NYS 559 (1934); Hanna Mfg. Co. v. Millerich & B. Co., 78 F2d 763 (CA5 Ga), cert. den. 296 US 645 (1935); Martin v. FIY Theatre Co., 10 Ohio Ops 338, 26 Ohio L ABA 67 (1938); Paramount Pictures Inc. v. Leader Press, Inc., 24 F Supp 1004 (DC Okla., 1938); O'Brien v. Pabst Sales Co., 124 F2d 167 (CA5 Tex), cert den 315 US 823 (1931); Continental Optical Co. v. Reed, 119 Ind. App 643, 86 NE2d 306, reh den 119 Ind App 653, 88 NE2d 55 (1949); Pallas v. Crowley-Milner & Co., 334 Mich 282, 54 NW2d 595 (1952); Cabaniss v. Hipsley, 114 Ga App 367, 151 SE2d 496 (1966); Man v. Warner Bros. Inc., 317 F Supp 50 (DCNY, 1970); Meeropol v. Nizer, 381 F Supp 29 (DCNY, 1974).

Many of the cases discussed above have been decided not only on the basis of the public personage and newsworthiness of the item involved, but on other factors as well. Regardless of whether a public figure or newsworthy feature is contained in the publicity, however, the plaintiff's consent is an important factor in determining whether an otherwise right of action may be precluded. The scope, time and limits upon this condition will now be considered and delineated in the following three sections.

Molony v. Boy Comics Publishers, Inc. involves an action to recover damages for alleged violation of plaintiff's right to privacy under the Civil Rights Law based on the portrayal of Donald Plummer Malony in the defendant's comic magazine as a hero in a disaster in which plaintiff was a major figure. The court concluded there was no ground for damages under the Civil Rights Law, though there were minor errors in the portrayal, 188 Misc. 450, 65 NYS2d 173, 98 NYS2d 119 (1950).

In 1952 professional baseball players brought action to enjoin use of their photographs by Model Airplane Company by contract with Hit Parade, Inc. from whom Theatre Concession, Inc. purchased them. The court held that when the pictures were merely placed in boxes of popcorn without any advertising outside the package that the pictures would be found, an injunction would not be granted, without irreparable damage, Jansen v. Hilo Packing Co.,Inc., 116 NYS2d 251 (1952).

Right of Privacy Precluded by Consent

Obviously there is no invasion of privacy if consent is given to the use of one's name or likeness. Such consent may be either oral or written. For example, typical of common law, Section 103-4-8, Utah Code Annotated, 1943, provides among other things that "anyone who uses for advertising purposes or for purposes of trade the name, portrait, ot picture of a person, if such person is living, without first having obtained the written consent of such person, or, if such person is dead, without the written consent of his heirs or personal representatives, shall be guilty of a misdemeanor". And Section 103-4-9 provides in part that "any living person, or the heirs or personal

representatives of any deceased person, whose name, portrait, or picture is used within the state for advertising purposes or for purposes of trade, without written consent first being obtained, may maintain an action against such person for using his name, portrait, or picture to prevent and restrain the use thereof; and may in the same action recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such a person's name, portrait, or picture in such manner as is declared to be unlawful, the jury or court, if tried without a jury, may in its discretion award exemplary damages", Donahue v. Warner Bros. Pictures, Inc., 194 F. 2d 6 (1952).

Earlier in New York, where a privacy statute also existed, the court decided that unless an individual's consent to the publication of his picture in a booklet sold by a corporation to its patrons attending a bicycle race was in writing, there would exist an incomplete defense to invasion of privacy for advertising purposes or for purposes of trade. In this case the publication was held to be for purposes of advertising, Miller v. Madison Square Garden Corporation, 176 Misc. 714, 28 NYS2d 811 (1941).

Later in 1961, action for damages for violation of a plaintiff's right of privacy by reason of publication of his name and cartoons in violation of the agreement between an animated cartoon producer and distributor produced the decision that the publication was not for the purpose of advertising or enhancing trade. When the distributor advanced funds to be recouped from profits from distributing efforts, he conferred absolute title to the cartoon on distributor, entitling it to recall the cartoon to a television company without producer's consent, Fleischer v. UPIX, Inc., 21 Misc. 2d 110, 197 NYS2d 356, affd. 10 AD2d 688, 199 NYS2d 423, 213 NYS2d 632 (1961).

In 1969 Ayn Rand sued the Hearst Corporation to recover for its use of her name without her consent, Rand v. Hearst Corporation, 31 AD2d 406, 298 NYS2d 405 (1969). Ayn Rand brought action against the publisher to recover under the Civil Rights Law of New York because of the reference to a book written by her claiming that she

"enjoys" the "Same Kind of Mystique Analysis As" the author of the paperback book and that "Their Underlying Drive Is The Same". The quotation was an excerpt from a review of the paperback book in a newspaper. The state supreme court dismissed the publisher's affirmative defenses; the appellate division reversed the order and dismissed the complaint, holding that the publisher did not violate the Civil Rights Law. On appeal the case was reversed again, upholding the original decision and granting Ayn Rand's claim for the unauthorized use of her name without her consent, 26 NY2d 806, 257 Ne2d 895 (1970).

Other cases relating to these conclusions are as follows: O'Brien v. Dabst Sales Co., 124 F2d 167 (CA5, Tex, 1941), cert. den. 315 US 823; Tanner-Price Co. v. Sims, 174 Ga. 13, 161 SE 819 (1931); Marek v. Zanol Products Co., 298 Mass. 1, 9 NE2d 393 (1937); Harlow v. Duno Co., 36 Pa. D & C 101 (1939); Johnson v. Boeing Airplane Co., 175 Kan. 275, 262 P2d 808 (1953); Porter v. American Tobacco Co., 140 App. Div. 871, 125 NYS 710 (1910); Sidney v. A.S. Beck Shoe Corp., 153 Misc. 166, 274 NYS 559 (1934); Hammond v. Crowell Pub. Co.,253 App. Div. 205, 1 NYS2d 728 (1938); Buscelle v. Conde Nast Publications, Inc., 173 Misc. 674, 19 NYS2d 129 (1940); Metzger v. Dell Publishing Co., 207 Misc. 182, 136 NYS 2d 888 (1955); Durgom v. Columbia Broadcasting System,Inc., 29 Misc. 2d 394, 214 NYS2d 752 (1961); Lomax v. New Broadcasting Co.,18 App. Div. 2d 229,238 NYS2d 781 (1963).

Limits of Consent

While in some cases it may be clear that the plaintiff had consented to a particular use of his name or likeness, in other cases dispute may arise as to whether his name or likeness was used in a manner to which he had not agreed. If the plaintiff's consent has been exceeded, there may be a cause of action for invasion of privacy.

Beyond Limits of Consent

Almind v. Sea Beach Ry. Co. represents a case in which the use of the plaintiff's picture for alleged "advertising purposes of trade", appears to be in violation of

the Civil Rights Law. The evidence shows the presence of the plaintiff, her six year old child, and her sister-in-law at a place where a picture was about to be taken and later used to teach passengers a self-ptotecting way to enter and leave a car. On appeal the court decided that evidence of her understanding and consent is insufficient, under the statute, to authorize the defendant. If it were, any person making a picture of one willing to sit for it could use it for advertising, by proving that the photographer disclosed the purpose and that she either consented or did not demur. The court further decided that the picture was taken for advertising, but not for trade purposes, 157 App. Div. 230, 141 NYS 842 (1913).

Feeney v. Young involved an action brought under the Civil Rights Law of New York for damages in the exhibition of the plaintiff's picture without her written consent. The plaintiff, in giving birth to a child, was compelled to undergo a "Caesarean section" operation. The defendant was her physician. She consented orally with the defendant that a moving picture might be taken of the operation, to be exhibited for medical societies and in the interest of medical science. The picture was then exhibited publicly in two of the leading moving picture houses in New York as part of a picture which was named "Birth". The exhibition was made clearly for the purposes of trade. The court decided that the picture, as presented on the screen, constitutes an offense under the statute, 191 App. Div. 501, 181 NYS 481 (1920).

Another case involving the program, "$64,000 Challenge", produced a similar court ruling. Again the action was brought by the contestant against the broadcasters on the basis of an alleged rigging of the contest. The court ruled that the complaint was insufficient to allege libel, for lack of allegation of special damage, but that the plaintiff should be permitted to replead, Holt v. Columbia Broadcasting Systems, Inc., 22 AD2d 791, 253 NYS2d 1020 (1964).

In these cases the court found the defendant's action and behavior consistent with the plaintiff's claim that consent had been exceeded. An early example of this category involved a complaint alleging that the defendant was a photographer employed to take pictures of guests in the plaintiff's home, and was paid an agreed upon

price for such employment. The plaintiff further contended that two photographs were taken of herself without her consent, and with the consent of her husband, with the understanding that they would be their personal property and their exclusive right to dispose of as they so desired. In violation of the plaintiff's rights, and without her consent, the defendant sold a proof or negative to a newspaper, which it published in connection with a false, scandalous, and defamatory article at the expense of the plaintiff, according to the plaintiff. The court ruled for the plaintiff on counts of both defamation and invasion of privacy, requiring the defendant to pay $10 within 10 days, Holmes v. Underwood & Underwood, Inc., 225 App Div 360, 233 NYS 153 (1929).

Additional cases in which the court found the scope of consent to have been exceeded are as follows: Sinclair v. Postal Tel. & Cable Co., 72 NYS2d 841 (1935); Young v. Greneker Studios,175 Misc 1027, 26 NYS2d 357 (1941); Russell v. Marboro Books, 18 Misc 2d 166, 183 NYS2d 8 (1959); Canessa v. J.I. Kislak, Inc.,97 NJ Super 327, 235 A2d 62 (1967); Manger v. Kree Institute of Electrolysis, Inc.233 F2d 5 (1956); Smith v. WGN, Inc., 47 Ill App 2d 183, 197 NE2d 482 (1964).

Within Limits of Consent

The courts have not always been in agreement with the plaintiff's contention that consent has been exceeded, however. In fact, at least as many cases have been ruled to the contrary.

For example, after a plaintiff orally consented to use of her picture for any legitimate purpose except for trade or advertising, defendant published her picture in McCall's Magazine. A jury returned verdict that the picture was not used for purposes of trade or advertising, Donohue v. McCall Corporation, 51 NYS2d 727 (1944).

In Callsa v. Whisper, Inc.the complaint alleges that defendant Harrison owned and published a group of magazines one of which is called Whisper. It is asserted that the defendants conspired to induce the plaintiff, then eighteen years old,

and who was employed by one of them, to participate in a picture on the assurance that the picture was to be made "solely for the purpose of posing one Gene Haver and that the photograph or others or reproductions thereof of the infant plaintiff would not be used or published in any of their magazines or publications or elsewhere." These representations, it is alleged, were knowingly false and were made for the purpose of using the plaintiff's photograph in the publication of the defendants without her consent and against her will and for "profit and commercial" advantage to the defendants from which they derived. The complaint then indicates that the picture, and its printed caption, were given wide circulation and were intended to and do portray to readers that the infant plaintiff was in a night club with a male companion and that she smoked and drank intoxicating beverages, which was untrue and was known by these defendants to be untrue.

The court decided that in determining whether or not this action may be maintained, it is immaterial whether the use by defendants' of plaintiff's picture holds her up to ridicule or contempt, inasmuch as the action is not one brought for libel, 101 NYS 532 (1950).

In 1953 another plaintiff enrolled in a Model and Charm School of the defendant, at whose request the plaintiff posed for two photographs and submitted a supply of them to be kept on file. Upon completion of the modeling course the plaintiff registered as a professional model with the modeling agency also operated by the defendant. An agreement was signed between the plaintiff and the defendant, which the plaintiff admits, but also raises questions as to its validity and construction. By the terms of the agreement, the defendant was to endeavor to obtain modeling jobs for the plaintiff for one year. In return for this, the plaintiff was to cooperate with the defendant by keeping her supplied with late photographs, and making herself available for publicity stunts and programs. The plaintiff's picture then appeared in the Chicago Defender with the statement that she was a contestant inthe "Miss Jet Credit" contest.

The court was asked to decide whether there was such a waiver of the right of

privacy by the plaintiff's consent as to deny her recovery against the defendants. The court decided that since she had entered into the agreement described above, she was not entitled to recovery on the theory of invasion of privacy by publication of a news item that she had entered a beauty contest to be run in connection with the grand opening of a store and the publication of the accompanyingphotograph furnished by the agency, Dabbs v. Abbott Publishing Co.,44 Ill App 2d 438, 193 NE2d 876 (1963).

In a case involving the issues of public personages, sufficiency of a plaintiff's identification, mistaken use of picture, malice, aswell as consent, a plaintiff brought an action against the publisher of Gay Atlanta magazine and Atlanta's Playboy Club seeking to recover damages for violation of her right of privacy. In count 1 she alleged that for the past six years she had been an "exotic dancer", and in 1960 had had her photograph taken to be used for the purpose of advertising herself and her act at various night clubs and show places throughout the US. She contended that the defendants had obtained a copy of the photograph in some unknown manner and, without her knowledge or consent, had published it in an advertisement carried in Gay Atlanta for several weeks inviting the public to Atlanta's Playboy Club. Under her photograph in the advertisement she was billed as "Dawn Darling--Provocative and Exciting Exotic Dancer", and with the assertion "She's Terrific". In the picture she was clothed only in two tassels and a scanty G-string.

Plaintiff claimed that she had never appeared at Atlanta's Playboy club nor used the stage name "Dawn Darling". Rather there was another woman dancing at the club under that name. The magazine was distributed weekly in the City of Atlanta and attributed to have a wide circulation among people who are looking for a place of entertainment and who consult it for the purpose of selecting various types of amusement. Proof before a jury trial tended to support these alleagations.

Count 2 added the contention that the photograph was used deliberately and maliciously with an intent to mislead the public and thereby damage her reputation.

The court concluded that there are at least three necessary elements for recovery under the theory of public disclosure of embarrassing private facts about the plain-

tiff: '(a) the disclosure of private facts must be a public disclosure; (b) the facts disclosed to the public must be private, secluded or secret facts and not public ones; (c) the matter made public must be offensive and objectionable to a reasonable man of ordinary sensibilities under the circumstances," Cabaniss v Hipsley, 114 Ga App 367 151 SE2d 496, 501 (1966).

The court concluded that : "Plaintiff was what is commonly referred to as a strip-tease, and, by the very nature of her occupation, the facts disclosed were neither private nor embarrassing to her. We prefer not to use the term 'waiver' in our decision here. Without precise analysis this concept may receive indiscriminate application, supra, 502.

Before arriving at its judgment, the court emphasized the overlap found in the four distinct kinds of invasion of privacy: '(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. We consider this analysis well-founded and take it as a starting point for our deliberations here," supra, 500.

The court concluded that on the basis of none of the four conditions did the defendant invade the privacy of the plaintiff who had not intended to keep her photograph secret or private, and who had sought and consented to the type of publicity which she received through the appearance of the photograph. The court also held, however, that if, on another trial, the jury should find that there was an unauthorized appropriation of the dancer's photograph and that private club's acts and conduct in using such photograph were of a character to import a premeditated or conscious and deliberate continuation of the appropriation, an award of punitive damages in favor of the exotic dancer would be authorized.

A year later, in Martin v. Senators, Inc., the court ruled that when a woman authorized the taking of her picture and its use on a bulletin board of a club, membership in which was open to the public, she waived her right of privacy with

respect to such photographs. The court further concluded that the club's subsequent use of the photograph in a newspaper advertisement was not unreasonable interference with the woman's right of privacy, 418 SW2d 660 (1967). Other cases which join consent, advertising and privacy with intrusion, public figures, false light and appropriation as they relate to the use of plaintiff's name or likeness are as follows: O'Brien v, Pabst Sales Co., 124 F2d 167, cert den 315 US 823 (1941); Pallas v. Crowley-Milner & Co., 334 Mich 282, 54 NW2d 595 (1952); Johnson v. Boeing Airplane Co., 175 Kan 275, 262 P2d 808 (1953); Sherwood v. McGowan, 3 Misc 2d 234, 152 NYS2d 658 (1956); Sharman v. C. Schmidt & Sons, Inc., 216 F Supp 401 (1963); Wrangell v. C.F. Hathaway Co., 22 App Div 2d 649, 253 NYS2d 41 (1964).

The cases listed above make substantial advances in depicting legal limits of consent in advertising and privacy, as do the preceding descriptions of cases which were held to be either not for purposes of advertising, notwithstanding a plaintiff's claim to the contrary, or if for purposes of advertising, at least not in excess of reasonable limits of consent on the part of the plaintiff for a variety of reasons.

Duration of Consent

The question as to how long consent for the publication of one's name or likeness for advertising purposes remains effective has frequently arisen as a critical issue in privacy cases. Courts have come to a variety of conclusions with regard to the liability of an employer who continues to use the name or likeness of an employee for advertising purposes or for purposes of trade after the termination of the employment relationship. Courts have further questioned the continued validity of consent when a long period of time has elapsed since the agreement was made, or when the plaintiff has formerly revoked his consent to the use of his name or picture for purposes of advertising or trade.

Termination of Employment

Since the State of Texas does not recognize a right of privacy, in awarding

damages for the unauthorized continued use by the employers of a branch manager's name on a form letter mailed with advertising matter after the termination of his employment and the right to use the name of an employee, the court ruled that no useful purpose would be served by remanding the case to the court below for another trial, US Life Ins. Co. v. Hamilton, 238 SW2d 289, 293 (1951).

In an earlier case it had been determined that during the period of time between the termination of employment and termination of employment contract, employers were permitted to send customers monthly statements and delivery tickets bearing the name of a salesman who had already been terminated, Scharaga v. Sinram Brothers, 275 App Div 967, 90 NYS2d 705 (1949).

In an action against an insurance company on a state agency contract for continuing to receive benefits after termination of the contract and for unauthorized use of the plaintiff's facsimile signature on its policies, the court concluded that the plaintiff was owed only his commissions in the amount of $33.37. The court further ruled that the plaintiff could not recover compensation for the use of his facsimile signature stamp for a period after termination of the agency contract even if such use was unauthorized, Schmieding American Farmers Mut. Ins. Co., 138 F Supp. 167 (1955).

Mrs. Frances P. Tullos brought an action for damages sufferes by her due to the publication of her likeness in a certain advertisement that appeared in the Atlanta Journal. The advertisement included a picture of "Lustre-Color Home Hair Coloring", various matter describing it, an order form, and a reproduction of her photograph, above the following language: "Miss Elgie Sprague, Lustre-Color authority from New York, will be in Rich's Drug Department, street floor, Tuesday, July 28, through Saturday, August 1, to advise you on your correct Lustre-Color shade". The court held that evidence on the issue of alleged unauthorized use of the plaintiff's portrait for commercial purposes, was sufficient to support a jury verdict for the plaintiff, Colgate-Palmolive Company v. Tullos, 219 F2d 617 (CA5, 1955).

Another complaint shows that for years the plaintiff had been employed under the

defendant, posing as "The Man in the Hathaway Shirt"; and the use of the plaintiff's posed photograph in connection with the sale of Hathaway shirts was contemplated by the parties. The plaintiff consented to the defendant filing with the US Patent Office a trademark using his photograph with a black patch over one eye. After the plaintiff left the defendant's employ, the defendant extended its use of the plaintiff's photograph to advertising women's blouses, which prompted the complaint. Plaintiff contends that his contract with the defendant did not authorize the use of his photograph with respect to thesale of women's blouses; and the defendant contends that its right is not so limited.

The court concluded that the plaintiff's grievance is not the breach of his right to privacy, which he does not particularly seek, but the alleged unauthorized use of his photograph in a special way without extra compensation. By his contract of employment and his consent to defendant's use of his photograph in its trademark, plaintiff relinquished his right to privacy. In essence, plaintiff's action is for breach of contract, that is, the use of his photograph in excess of the right and privilege which he granted to defendant. Section 51 of the New York Civil Rights Law does not afford relief for mere breach of contract. The court pointed out from Sherwood v. McGowan, 3 Misc 2d 234,235, 152 NYS2d 658, 659, that "resort to the statute under these circumstancesperverts its purpose." Wrangell v. CF Hathaway Co., 22 AD2d 649, 253 NYS2d 41 (1964).

Lapse of Time or Revocation

In perhaps the first case to consider consent in connection with the right of privacy, the court found it difficult to deny that Mary Garden had agreed to the use of her name and picture. Indeed, for more than 20 years this plaintiff unquestionably permitted defendant to identify her name, her beauty, and her popularity to designate the product as "Parfum-Mary Garden". No other inference could be drawn from the writing signed by her stating that: "I am pleased to give youherewith permission to use my name and portrait in connection with the perfume which you have originated,

known as the perfume Mary Garden," Garden v. Parfumerie Riquad, 151 Misc 692, 271 NYS 187 (1933).

Nor could belief be extended to the claim that the importance of the document was unknown to her and that she never intended to allow the defendant's predecessor this privilege. Not only did she maintain silence for more than twenty years while he made use of her name and portrait, but entranced, perchance, by the seductiveness of the aroma of the perfume, she indulged herself in poetic flight by writing to the defendant: "how could I object to anything so charming? And thanks a million times for the bottles already received," ibid.

In Garden v. Parfumerie Riquad, Inc., the court concluded that of all the objections raised by the plaintiff, only one was worthy of judicial consideration, sufficient for the maintenance of this action, and entitling the plaintiff to the relief sought: "The one that permission to use name and portrait is revocable stands out with force. It is the well-settled law of this state that a gratuitous license--and that is the best that can be said of the permission granted by the plaintiff--to use name and portrait, is revocable at any time, even though action has been taken upon it. The court cannot lend itself to defendant's claim that, having trademarked the article and invested considerable money to popularize it, no revocation is possible. It may well be that by revocation serious impairment of business results. But that is a danger and risk assumed in accepting a consent unlimited as to time and against which, in the beginning, guard could easily be had. Regardless of plaintiff's reason for her refusal to continue permission to use her name, and even admitting that her reason is ulterior and mercenary, it cannot be denied that her name and her portrait are her own and during life solely at her disposal. She therefore cannot be gainsaid in her refusal, and defendant must be restrained. However, whatever wares have been manufactured by the defendant or are in the process of manufacture may be purveyed by the defendant, but no perfume or other toilet accesory may be produced as Mary Garden perfume or perfumed with parfum Mary Garden," 151 Misc 692, 271 NYS 187 (1933).

All of the cases discussed thus far have involved the issues of consent and/or public figures as they relate to the use of name or likeness in advertising and the right of privacy. Still another condition, which can alter a court's decision with regard to either consent or public figures, is that of malice.

Impact of Malice

Fewer cases of malice have arisen than have other elements of invasion of privacy, and in many cases a lack of malice is completely immaterial to the liability anyway. Nevertheless, in some cases the question of malice, like the question of written consent, may affect the amount of damages that may be recovered. Likewise, malice may be overcome with consent, just as a lack of consent may be overcome by being a public figure.

Probably the most conspicious case which may be useful in defining the malice concept, as it relates to the use of name or likeness in advertising, is that of Time v. Hill, where the US Supreme Court reversed a lower decision, finding malice to be nonexistent as its basis for ruling that no invasion of privacy had occurred. On the contention that Life magazine had falsely reported that a new play portrayed an experience suffered by the Hill family, the court rejected the negligence standard where public figures are involved, holding that the publisher must know that newsworthy reports are false or that he acted in reckless disregard of the truth.

On the malice question the Supreme Court concluded that: "Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait..." 385 US 374 (1967).

Alleging that the Life article gave the knowingly false impression that the play depicted the Hill incident, Hill sued for damages under New York statute providing a cause of action to a person whose name or picture is used by another without

consent for purposes of trade or advertising. The trial court instructed the jury that liability under the statute depended upon a finding that the Life article was published, not to disseminate news, but as a fictionalized version of the Hill incident and for the purpose of advertising the play or increasing the magazine's circulation.

On this issue, the US Supreme Court concluded that: "The requirement that the jury...find that the article was published 'for trade purposes', as defined in the charge, cannot save the charge from constitutional infirmity. 'That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.' Josepf Burstyn, Inc. v. Wilson." Time v. Hill, 385 US 374 (1967).

Although the conviction was not obtained in this case, in dicta Cabaniss v. Hipsley, supra, further illustrates the role of malice in the allegedly unauthorized use on name and likeness. Here no evidence was offered of an intentional misuse of the photograph on the part of the defendant. He simply published the photograph given to him by the agent of the other defendant, assuming that it was a photograph of "Dawn Darling". Notification of the mistake was not made to him while the advertisement was running; nor does the evidence disclose any circumstances from which it might be inferred that he had, or was in a position to have, actual knowledge of the mistake.

Without any evidence upon which to predicate liability for punitive damages against defendant Cabaniss, such damages were sought on the basis that not only was the plaintiff's photograph used without her consent, but that it was used deliberately and maliciously with an intention on the part of the defendants to mislead the public and thereby damage petitioner's reputation.

The court concluded that it does not think that there was any duty on the part of defendant Cabaniss to discover and prevent the mistake--"should have known"--so that a failure to do so would authorize an award of punitive damages: "Punitive damages can be awarded upon the same basis as in other torts, where a wrongful motive

or state of mind appears, but not in cases where the defendant has acted innocently, as for example in the belief that the plaintiff has given his consent," supra.

Thus it appears that a conviction might have been obtained for lack of consent only if actual malice had been demonstrated in the evidence and if punitive damages had been sought therefrom.

In a later case a divorced husband brought action against his divorced wife for a decree enjoining her from using his surname for advertising or trade purposes, in contravention of their agreement, and for indidental damages, both compensatory and general. After agreeing not to use plaintiff's name by virtue of their divorce, defendant placed an advertisement in a newspaper setting forth change of business name, a listing in the telephone directory using plaintiff's name. Defendant furthermore used plaintiff's name on the lawn in front of the defendant's place after previously agreeing to use plaintiff's name in the event of divorce. Since these uses of plaintiff's name for advertising purposes were only isolated instances and not continued for any length of time, the court concluded that in the absence of any showing of malice, one whose name has been wrongfully used cannot recover exemplary damages, Fullerton v. Kennedy, 19 Misc 2d 502, 187 NYS2d 213 (1959).

The following year, in Emanuel v. Free Lance Photographers Guild, Inc., the court concluded that the record satisfactorily establishes that defendants sold plaintiff's photograph in good faith and in the honest belief that it was the photograph of another woman, from whom they had obtained for a consideration a release to sell it, and in the absence of proof that defendants knowingly used plaintiff's portrait or picture, exemplary damages may not be awarded, 28 Misc 2d 503, 219 NYS2d 626 (1960).

Other cases involving the accidental use of plaintiff's name or likeness for advertising purposes, in which the malice contention was defeated, are as follows: Peck v. Tribune Co., 154 F 330 (CA, 1907)., 214 US 185 (1907); Flake v. Greensboro News Co., 212 NC 780, 195 SE 55 (1938); MacIver v. George Braziller, Inc., 32 Misc 2d 477, 224 NYS2d 364 (1961); Man v. Warner Bros, Inc., 317 F Supp 50 (DCNY, 1970).

Extent of Disclosure of Plaintiff's Name or Likeness

In order for there to be an invasion of privacy for the use of name or likeness for advertising or trade purposes, it must be clear that the defendant's publication or otherwise reproduced and disseminated facsimile clearly identifies or refers to the plaintiff.

Sufficiency of Identification

Loftus v. Greenwich Lithographing Co.,involved an action predicated on the provisions of sections 50 and 51 of the New York Civil Rights Law to enjoin the respondents from using the portrait or picture of the plaintiff for advertising purposes, or for the purposes of trade, without having her written consent, and to recover damages sustained by the plaintiff from such use of her portrait or picture. On appeal, the court reversed a lower judgment and upheld the plaintiffs claim, 192 App Div 251, 182 NYS 428 (1920).

In this case an actress appeared in the Midnight Frolics in a rose garden scene in a special costume called the rose costume. She had her photograph taken in this costume by one who testified that he was taking photographs of several of the artists in that play, representing different parts, and that he made artistic reproductions of Miss Loftus in a red costume representing a rose. There is evidence that this costume was never worn by any person other than the plaintiff, that she so appeared in public, that she became known widely in that character, that she would be readily recognized from the photograph, and particularly from the costume and pose, even though there were, as here, a slight change in the outline of the features and in the poise of her head, incident to enlarging the portrait or picture and adapting it to a particular character by the respondents in the preparation of a poster of a photoplay known as "Shame", ibid.

This photograph was reproduced in an issue of Harper's Bazaar, the Metropolitan Magazine, and Town and Country without the plaintiff's consent. Furthermore, the plaintiff had no connection with the photoplay "Shame", and she did not pose in the photoplay "Shame". Posters for advertising the photoplay "Shame" were displayed in

various parts of the city of New York and vicinity. The word "Shame" in the poster was printed in very large letters. The poster represented a man standing between the advertisement at the extreme left and the advertisement a little to the right of the center, and looking and pointing his right hand in scorn at a woman represented as standing at the extreme right of the poster, with her head slightly bowing, ibid.

Young v. Greneker Studios represents a case in which the court determined that a manikin in the form, features, and likeness of a human model is a "portrait" or "picture" within the New York Civil Rights Law authorizing action for an injunction and damages by any person whose name, portrait, or picture is used for trade purposes if such person has not granted consent, 175 Misc 1027, 26 NYS2d 357 (1941).

In Kerby v. Hal Roach Studios, Inc. the court further decided that the circulating of a letter bearing the plaintiff's name as the apparent signer of a handwritten signature in a feminine hand, of a nature which casts doubt on plaintiff's moral character, when the letter was circulated for purposes of advertising a moving picture, is actionable as constituting an invasion of the plaintiff's right of privacy. Nevertheless, in this case, the court further concluded that, based upon the facts stated above, since the defendants had no intent to refer in the letter to the plaintiff and did not know of her existence, there was no malice and therefore no defense to action for invasion of the plaintiff's right of privacy, 53 Cal App 2d 207, 127 P2d 577 (1942).

Adrian v. Unterman provided the dicta that a surname alone is within the provision of the New York law authorizing one whose name has been used for advertising purposes without his consent to maintain an action to enjoin such use. Nevertheless, in this case the plaintiff had transferred the right to use his trade-name or facsimile of his signature long before to the instution of the court action, 281 App Div 81, 118 NYS 2d 121, affd 306 NY 771, 118 NE2d 477 (1952).

By reason of an action for damages for violation of the plaintiff's right of privacy resulting from the publication of his picture without his consent, the case of Buzinski v. Doall Company suggests that a mechanical science magazine possessed

the right to publish the picture of a combination trailer car known as a land yacht, as a matter of public interest, and that the plaintiff, whose appearance therein was reasonably related to the subject of the picture could not maintain an action for invasion of privacy, even though he did not consent to its publication, 175 NE 2d 577 (1961).

In an action which was brought for the alleged invasion of the plaintiff's right of privacy and for libel, the court held that the manufacture and sale of a fabric which reproduced a piece of newspaper with an article reporting the loss of a tennis match by the plaintiff did not constitute an invasion of the plaintiff's right of privacy in violation of the Civil Rights Law of New York or a libel, in the absence of special damage, Moglen v. Varsity Pajamas Inc.,13 AD2d 114, 213 NYS2d 999 (1961).

In a case whereby a professional entertainer to recover damages for invasion of privacy, defamation, and unfair competition, the court concluded that if the legislature had intended that whenever an anonymous speaker extolled a commercial product a cause of action might arise if anyone could substantiate the claim that the voice was mistaken as his. In this case the complaint was not defective in failing to demonstrate competitive interest or purpose served or real confusion of product which would lead to the loss of opportunity in the entertainment field. Merely identifying an individual defendant as an officer of co-defendant corporation is insufficient to prove personal liability of the officer for tortious acts allegedly committed by the corporation, its officers, etc., but the corporate officer is liable for torts in which he personally participated, regardless of whether he was acting within the scope of his authority, Lahr v. Adell Chemical Co., 300 F2d 256 (CA1, 1962).

The case of LaForge v. Fairchild Publications, Inc. involved a proceeding on the claim of invasion of privacy by defendants' pictorial story and its publication. From an order denying the defendants' motion to dismiss, an appeal produced the judgment that a publication, without the plaintiff's consent, of a picture of the plaintiff and others garbed in sport jackets of patticular material is not for advertising

purposes or for the purpose of trade within New York Civil Rights Law and does not invade the plaintiff's privacy, where no one was identified and illustrations related to article of legitimate public interest to more than 20,000 subscribers to a publication largely emphasizing matters of interest to those in men's and boys' wear and textile industries, 23 AD2d 636, 257 NYS2d 127 (1965).

The case of Brauer v. The Globe Newspaper Company rendered the conclusion that publicity which casts the plaintiff in a false light in the public eye through a publication in the defendant's newspaper of a photograph of the plaintiff could not be maintained where the photograph as published as published did not indicate to the public that it was one of the plaintiff, despite the fact that a small group of neighbors, friends, and relatives of the plaintiff, familiar with him and with the circumstances in which the photograph had been taken, recognized him as the person depicted therein, 351 Mass 53, 217 NE2d 736 (1966).

Yet in Flake v. Greensboro News Co. the court determined that the publication of the plaintiff's photograph or likeness in connection with an advertisement was sufficient for her to recover for invasion of privacy despite the fact that the picture bore as a caption the name of a person other than the plaintiff, 212 NC 780, 195 SE 55 (1938).

In Cabaniss v. Hipsley, however, the court ruled that a publication wrongly identifying the name of another, "Dawn Darling", with the plaintiff's picture served as an insufficient basis to authorize a verdict for general damages to the plaintiff's reputation, since there was no evidence suggesting that the stage name "Dawn Darling" was in a category materially different from that which would include the stage names which plaintiff had used, supra.

Incidental Use of Name

As was implied in the previous section, in order to constitute an invasion of privacy under the New York Civil Rights Law, the use of a name must amount to a meaningful commercial purpose rather than a mere incidental taking, Moglen v. Varsity

Pajamas, Inc., supra. There have been several cases in which the reference to the plaintiff has been held too incidental to amount to an invasion of privacy.

In a case of a motion picture entitled "The Inside of the White Slave Traffic" which showed a factory building upon which there was a sign bearing the name and business of the plaintiff, the court held in Merle v. Sociological Research Film Corp. that the use of the plaintiff's name is not for the purpose of obtaining trade or advertisement, but merely appears in the picture because it was placed upon the building which is a part of the picture. It is therefore a mere incidental part of a photograph which cannot be presumed to add to the value of the photograph for trade or advertising, and even a use that may in a particular instance cause acute annoyance cannot give rise to an action under the statute unless it fairly falls within the terms of the statute, 166 App Div 376, 152 NYS 829 (1915).

The case of Humiston v. Universal Film Mfg. Co. involves the presentation of the plaintiff's name and picture as news in a motion picture film depicting current events, and the publication of the plaintiff's name and picture on certain posters used to announce the subjects of current interest exhibited by the film. The court concluded that if the presentation of this film be not a crime, the use of the plaintiff's name or picture in the approach to the theatre and upon the screen is incidental to the exhibition of the film itself, 189 App Div 467, 178 NYS 752 (1919).

In Stillman v. Paramount Pictures Corporation the plaintiff, in the conduct of a gymnasium for the training of prize fighters in the City of New York, had acquired an excellent world-wide reputation and established valuable good will. The defendants produced and distributed, for public exhibition, a fictional dramatic motion picture entitled "The Country Girl" in which one of the principal characters utters words, carried on the sound track as part of the fictional story, to the effect that he could go to "Stillman's Gym and get a punch-drunk fighter". This action is based on the plaintiff's claim that the defendants used his name, without his consent, for purposes of trade in violation of Civil Rights Law, §§ 50 and 51, and that the

reference to the plaintiff was libelous. The court concluded that since these sections do not prohibit the incidental, momentary and isolated use of such words as "Stillman's Gym", even if such place is operated by a living person of the name "Stillman", 2 App Div 2d 18, 153 NYS2d 190, affd 5 NY2d 994, 184 NYS2d 856, 157 NE2d 728 (1956).

On the other hand, in Schneiderman v. New York Post Corporation the court held that the defendant club's publication at least twice in defendant newspaper of an advertisement story mentioning the plaintiffs as having been recently married following their prior meeting at the club, without written consent of the plaintiffs, did violate the Civil Rights Law and defendants were therefore liable for damages. The court concluded that although a single publication of the alleged news item possibly may take on the posture of "an incidental publishing", its reprint, however, exemplifies an effort towards soliciting and inducing readers to patronize the named country club, 3] Misc 2d 697, 220 NYS2d 1008 (1961).

Remaining Limits on Whom May Bring Action Against Whom

Many of the conditions upon which action for the unauthorized use of the plaintiff's identity for advertising or trade purposes will withstand judicial scrutiny have been delineated above. Additional statutory and common law stipulations will be set forth in the following pages. In each case it should be kept in mind, however, that the right of privacy is a personal right and cannot, generally, be asserted by anyone other than the individual whose privacy has been invaded, Schuman v. Loew's Inc., 135 NYS2d 361 (1954).

1. Decedent. This section suggests that while a person, firm or corporation that uses for advertising or trade purposes the name, portrait, or picture of any living person without having first obtained written consent of such person, may be guilty of an invasion of privacy, such right to privacy does not exist on behalf of any relative or personal representative of any deceased person, Runyon v. US., 281 F 2d 590 (CA3, 1960).

For a privacy claim is a peculiarly personal one, Shibley v. Time, 40 Ohio Misc 51, 59 (1974). It cannot be asserted by a family member, it cannot be assigned, and it does not survive death, Young v. That Was the Week That Was,312 F. Supp. 1337 (ND Ohio, 1969), affd 423 F2d 265 (CA6, Ohio 1970).

A Utah statute, however, forbids the use, for advertising purposes or purposes of trade, of the name, portrait, or picture of a deceased person without the written consent of his heirs or personal representatives. In Donahue v. Warner Bros. Pictures, Inc. the court held that a picture within the meaning of the statute included any representation of the person, including such representation by an actor portraying the deceased, 194 F2d 6 (CA10, Utah 1952).

2. Corporate Name or Partnership Name. In the case of Jaggard v. RH Macy & Co. Ginetted Jaggard, who was a well-known dress designer, originally filed a certificate to do business under the assumed name of "Ginette deParis", and thereafter engaged in business under that name. In 1935 she caused to be formed a corporation known as Ginette deParis, Inc., and granted to it the sole and exclusive right to use the name she had adopted in connection with the sale of dresses. The violation alleged is the use of the name "Ginette deParis" in connection with the sale of patterns of a dress designed by the plaintiff. It is clear that no cause of action has been established. Neither a partnership name nor a corporate name are within the protection of the New York Civil Rights Law. According to the court it follows logically that a name assumed for business purposes only, the exclusive uses of which has been granted to a corporation, is in the same category. "In no aspect do the facts establish the charge of unfair competition," 176 Misc 88, 26 NYS2d 829, affd 265 App Div 15, 37 NYS2d 570 (1941).

In Shubert v. Columbia Pictures Corporation the complaint alleges that the owner of the Winter Garden Theatre, which has become known to the general public as one of the greatest show places in the nation, which possesses a widespread reputation in connection with its presentation of theatrical plays, musical comedies and other types of entertainment, and which enjoys valuable good will in connection with such

entertainment, also owns some kind of property right to the appearance of these qualities. When the defendant produced the motion picture "The Jolson Story", which purports to show the Winter Garden Theatre, both interior and exterior, the famous runway known as "the bridge of thighs", consisting of an extension and elongation of the stage throughout the orchestra, and a large number of plays produced by the individual plaintiffs and their affiliated companies in which Al Jolson appeared and played a prominent role, the plaintiffs brought forth this cause of action.

Here the court announced that in order for the plaintiffs to make out a case of unfair competition, the proof must show the existence of a property right, plaintiffs' ownership of that property, and a misappropriation of that property right by the defendant, or at least a deception of the public occasioning damages to the plaintiffs. It held that notwithstanding the plaintiffs' assertion that they own the good will in and to the Winter Garden Theatre, and that this good will had been appropriated by the defendant, that the plaintiffs do not possess any property right in the name "Winter Garden", 189 Misc 734, 72 NYS2d 851, affd without op 274 App Div 751, 80 NYS2d 724 (1947).

3. Public Domain. Seidelman v. State involved a claim against the State of New York resting upon a violation of the Civil Rights Law and an allegation that the State published and circulated the claimant's picture for trade and advertising purposes without consent. The State moved for an order dismissing the complaint for failure to state a cause of action and for lack of jurisdiction. The court held that the action was maintainable under the statute waiving the State's immunity from suit. This statute waives immunity as to "liability and action", but only where an individual or corporation would be required to answer to an action for the same thing, 202 Misc. 817, 110 NYS2d 380 (1952).

In the appeal of Jaccard v. RH Macy, & Co. the court went on to suggest that: "In addition to the reasons upon which the trial court based its decision in awarding judgment to the defendant, we find that such judgment was warranted for the further

reason that the dress involved herein had been placed in the public domain without the protection of copyright. Accordingly, in the absence of unfair competition, defendant had the right to copy the dress, or to sell patterns thereof, and in doing so could truthfully state that the dress was designed by the individual...Under the circumstances the use of the individual plaintiff's name as the designer of the dress, in connection with the magazine article advertising a pattern thereof, would not afford her any right to damages under §§ 50 and 51...even if her true name, rather than an assumed business name, had been used," supra, 571.

4. No Allegation for Advertising or Trade. In the case of Pittera v. Parade Publications, Inc. the court examined the pleading and the offending article, annexed to the complaint, and concluded that the cause of action fails to allege that the unauthorized use of the photo and article were used for trade or advertising purposes and is insufficient. The court went on to state that: "The language of the article and the facts set forth in the pleading persuade us that the deficiency could not properly be supplied on a new pleading to meet the requirements of the applicable sections of the Civil Rights Law," 15 AD2d 882, 225 NYS2d 478, 479 (1962).

5. Abuse of Process. In Cardy v. Maxwell the plaintiff alleges that the unauthorized use of his name was for the purpose of extorting money from him to induce defendants to withdraw his wife's deceit action. "This is clearly not a use for advertising purposes," said the court, and it is "not a use for 'the purpose of trade' within the meaning of the statute. Sections 50 and 51 of the Civil Rights Law were, as their language clearly indicates, designed to prevent commercial exploitation of a person's name, portrait or picture", 8 Misc 2d 329, 169 NYS2d 547, 550 (1957). The court concluded that the defendants' use of the plaintiff's name for the purpose of avoiding trial on merits was sufficient to state a cause for action for abuse of process, ibid.

Conclusion

In the above pages a variety of conditions have suggested that when the unauthorized use of identity may have occurred for purposes of advertising or trade under both

statute and common law another variety of reasons sometimes determines the outcome of the case. More often than not, however, a combination of reasons serves to determine the ruling of the court. Whether a case is determined to be for advertising or trade purposes seems to depend at least in part upon how private the defendant is, how malicious the defendant is, how much is given in return for the plaintiff's consent, and so forth. Many of these conditions overlap, and the question remains: how the defendant may know in advance exactly where to draw the line. This dilemma is somewhat mitigated, however, by a rather liberal latitude granted to the defendant by the courts. Such a judicial atmosphere is illustrated above and below.

In Shubert v. Columbia Pictures Corporation the complaint alleges, for example, that the defendant has caused to be published a circular containing a synopsis describing the story of the motion picture. Here the name "Shubert", the theatre owners' name, is mentioned in two instances--once in connection with the identification of one Baron who is stated to have become manager for the Shuberts and again in connection with the identification of the individuals who first opened the Winter Garden Theatre, supra,853. Despite the further taking of the theatre's identity mentioned above, the court found that whether or not plaintiffs specifically granted their lessees the right to use the name Winter Garden is immaterial. For the good will of a public building, such as a theatre or hotel, runs with the building, and that good will passes with the lease of the building to the lessee and cannot be severed therefrom even by its first adopter and user, supra, 855. The court concluded that despite a forty-five year period of shows presented at the Winter Garden prior to its conversion into a movie theatre, and despite the fact that a motion picture showing Jolson performing at the Winter Garden in the shows in which he appeared there has destroyed the possibility of producing a motion picture concerning the history of that theatre and the personalities who appeared in the shows which were produced there, the court denies the prospect that a picture based upon the plays which took place in the Winter Garden, whether bearing the title "Winter Garden" or some other title whether using the talent of ex-Winter Garden stars, or whether

using the name of the owners of the theatre in its advertisements, could be produced as a box-office or entertainment success, supra, 856. The court held that even the combination of the above comprised an insufficient cause of action. Under the Civil Rights Law it could not be for purposes of advertising or trade.

A somewhat similar case occurred in People v. Robert R. McBride & Co. in which the author's unfolding of the historical narrative of strike breaking includes the name of Stern inside as well as his picture on the front cover, along with eight others. The court ruled that neither the picture nor the name was used for purposes of advertising the book, 159 Misc 5, 288 NYS 501, 504 (1936). Consequently the plaintiff failed to state a claim for which relief could be granted.

One of the most well known and classic cases held not to be for purposes of advertising or trade is that of Sidis v. F-R Pub. Corporation. While often viewed as a public figure/newsworthy case, it is a consent case as well. Here the court decided that the unauthorized publication of the intimate details of private life are not entitled to an absolute immunity from the prying of the press, and that a limited scrutiny may be had of the private life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a 'public figure', 113 F. Rep. 2d 806 (CA2, 1940).

Usage of Name or Likeness as Invasion of Privacy

This section will include the indorsement of products or services, the usage of name on product, the usage of name as part of corporate name, the usage of name or likeness to increase circulation of publication, the usage of pictures for display purposes, in newspapers or other printed publications, and on television or in motion pictures; the usage of name or likeness in cable television, the mistaken usage of picture, and the usage of name or likeness in a false light to misrepresent authorship or statements, or to alter the picture of a plaintiff.

Indorsement of Products or Services

The unauthorized use of someone's identity in an effort to convey the impression that this person indorsed defendant's products or services has been held by the court to comprise an invasion of privacy. For example, the use of the name of the plaintiff, as a noted educator and writer, without his consent by the booksellers in advertising an edition of their standard works as being their selection constitutes a violation of the New York Civil Rights Privacy Law. Eliot v. Jones 66 Misc 95, 120 NYS 989 (1910).

In Schneiderman v. New York Post Corporation the court considered an action for injunctive relief and damages for the unauthorized use of the plaintiff's names in violation of the Civil Rights Law. It held that the defendant club's publication at least twice in defendant newspaper of advertisement story mentioning plaintiffs as having been recently married following their prior meeting at the club, without written consent of the plaintiffs, violated the statute and defendants were liable in damages, supra.

In another action under the Civil Rights Law, the court held that where plaintiff did not consent in writing to the use of her name and picture for advertising purposes in a camera manual which advertised a camera, publication of the plaintiff's picture in the manual is not within the scope of the statute, Selsman v. Universal Photo Books, Inc., 18 AD2d 151, 238 NYS2d 686 (1963).

The court held in Brociner v. Radio Wire Televisions, Inc. that where the plaintiff was in a contractual relationship with the defendant and designed certain devices for it, truthful statement of the plaintiff's association with product in defendant's advertising would not support a cause of action for breach of the New York Civil Rights Law, 15 Misc 2d 843, 183 NYS2d 743 (1959).

Thompson v. GP Putnam's Sons involved an action for alleged violation of the right to privacy statutes and for libel brought against the publisher and others by a literary critic on complaint that the Introduction and Note appearing in a book and allegedly intended to increase the sales of the book used language implying that

the plaintiff regarded the book as having literary merit whereas contrary opinion was the case. The court held that the claims under the right of privacy statute were sufficient as against a dismissal motion but that the claim for libel was insufficient.

On the latter issue the court felt that: "The mere fact that the plaintiff's personal opinion may be that the work is without literary merit is of no consequence. The reading public may disagree with plaintiff's personal view, in which event his reputation would not be adversely affected by the false attribution to him of a favorable opinion as to the literary merit of the book," 40 Misc 2d 608, 243 NYS2d 652, 655 (1963).

In an action for libel and for invasion of the right to privacy and publicity based on use of plaintiff's picture in an advertising campaign put on by the defendant, the court held that an action for libel on the theory that advertising in which a plaintiff's picture was used to promote the sale of beer subjected plaintiff to conspicious ridicule and scorn could not be maintained where the plaintiff voluntarily permitted his picture to be taken for a consideration and executed at the time releases giving unrestricted permission to the use of his picture, distorted in character or form. Hence the judgment is for the defendant, Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (ED, Pa 1963).

Other cases involving the indorsement of products or services include the following: Peck v. Tribune Co., 154 F 330 (CA7, Ill), revd on other grounds 214 US 185 (1907); Foster-Milburn Co. v. Chinn, 134 Ky 424, 120 SW 364, app 137 Ky 834, 127 SW 476 (1909); Flake v. Greensboro News Co., supra; Pallas v. Crowley, Milner & Co.,322 Mich 411, 33 NW2d 911 (1948); Jansen v. Hilo packing Co., 116 NYS2d 251 (1952); Fairfield v. American Photocopy Equipment Co., 138 cal App 2d 82, 291 P2d 194 (1955); Roberts v. Conde Nast Publications, Inc., 286 App Div 729, 146 NYS2d 493 (1955); Manger v. Kree Institute of Electrolysis, Inc., 233 F2d 5 (CA2, NY 1956).

Thus it appears that one critical perquisite exists for the usage of another's name or likeness for the indorsements of products or services: consent. Without such consent, usually in writing, an action will lie for which relief may be granted provided a substantial relationship exists between the name or likeness employed

and the advertisement itself, Namath v. Sports Illustrated, 48 AD2d 487, 371 NYS2d 10 (1975).

Usage of Name on Product

Closely related to the use of one's identity for the indorsement of a product is the use of one's name to identify or promote a product. Thus it is in Jaccard v. RH Macy & Co. where a designer of exclusive clothes for women, who designed a wedding gown with certain distinctive features using her own name to identify the product. In so doing, without obtaining a copyright on the product, the plaintiff lost the exclusive right to the use of her own name on similar products of defendant, supra.

A very different outcome occurrs, however, in the case of Orsini v. Eastern Wine Corporation. Here the plaintiff sued for damages under Section 51 of the Civil Rights Law, and for an injunction restraining the defendant from using on its label the surname, Orsini, in conjunction with the plaintiff's coat of arms.. Alleging that he is the oldest living member of the Orsini family, the plaintiff asserted the right to use the coat of arms. It was claimed that the defendant, without the plaintiff's consent, affixed the name Orsini to labels of certain of its wine products as well as the Orsini coat of arms for commercial and advertising purposes. The court ruled that the complaint here alleging identification by coat of arms and surname satisfies the requirements of the statute with respect to identification, 190 Misc 235, 73 NYS2d 426 (1947), affd 273 App Div 947, 78 NYS2d 224, app den 273 App Div 996, 79 NYS2d 870 (1948). On appeal the court concluded that the name Orsini, together with the family crest and the princely crown, identifies the plaintiff in the public mind as the individual whose name is being used without his consent for trade purposes.

Additional cases involved with the usage of name on products include the following: Edison v. Edison Polyform & Mfg. Co., 73 NJ Eq 136, 67 A 392 (1907); Eliot v. Jones, 66 Misc 95, 120 NYS 989, affd without op 140 App Div 911, 125 NYS 1119 (1910); Prest v. Stein, 220 Wis 354, 265 NW 85 (1936).

Usage of Name as Part of Corporate Name

In a number of cases the court has confronted concern over the use of the plaintiff's name as part of a corporate designation as it comprises an invasion of privacy. In the case of Tanner-Brice Co. v. Sims the court held that a corporation in the State of New York can by user acquire a right to use a trade-name other than its corporate name in connection with its business; that a corporation, in adopting a trade-name, can embrace the surname of another person, when this is done with the consent of that person. When the corporation uses such surname and on the faith of the license makes expenditures of money, such license becomes an agreement on a valuable consideration and is irrevocable. The right of a corporation to use the surname of another person with his consent is not prohibited by statute, nor does it violate his right of privacy, 174 Ga 13, 161 SE 819 (1931).

The case of Bernham v. Bernham-Stein Furs, Inc. involved an action to enjoin defendants from using plaintiff's name in corporate defendant's title, and for an accounting. The court held that where the plaintiff and individual defendant entered into an agreement whereby the right to use the name of defendant corporation, which combined the names of plaintiff and individual defendant, would cease if parties disassociated themselves, the subsequent dissociation agreement, by which plaintiff and defendant released each party from any claim against the other, did not excuse breach of agreement not to use the name of corporation, and continued use violated the New York Civil Rights Law, 123 NYS2d 872 (1953).

Likewise when a person who has been in business for himself sells stock in such business to others, he loses any privacy right in the continued use of his name in connection with said business. Here by his own voluntary act he gave the corporation his name and the right to use it, White v. William G. White, Inc., 160 App Div 709, 145 NYS 743 (1914).

Usage of Name or Likeness to Increase Circulation of Publication

While over the years many common law decisions have sought to protect the privacy

of plaintiffs against the unauthorized use of their identity for advertising or trade purposes, the New York Civil Rights Law specifically denies the right to publish a person's picture or to use his name in an article for the purpose of increasing the circulation of the offending publication. A number of decisions illustrate and qualify this intent.

The case of Middleton v. News Syndicate Co., Inc. involved an action for the unauthorized use of the name and picture of the plaintiff in violation of the Civil Rights Law and for libel. The plaintiff, was at the time of the publication an unemployed model. She alleged that her name and picture appeared in the Daily News in a column known as "The Inquiring Photographer". She further alleged that she was described therein as a cigarette girl employed by the Commodore Hotel. The court concluded that the column which embodied the article containing the plaintiff's name and portrait was not intended or used for advertising purposes or for purposes of trade. Furthermore, the court held that the publication did not injure the plaintiff's reputation, 162 Misc 516, 295 NYS 120 (1937).

In Semler v. Ultem Publications, Inc. the court observed evidence that a professional model was an infant and that consent of her parents or guardian was not obtained for use of her photograph in negligee which appeared in a magazine of defendant. The court authorized recovery for such unauthorized use regardless of whether the model herself had consanted, 170 Misc. 551, 9 NYS2d 319 (1938).

The case of Thompson v. Close-Up, Inc. represents an order denying defendant's motion for judgment on the pleadings. The court held that where the amended complaint alleged that plaintiff had no connection with dope selling, which was the subject of the defendant's magazine article, and was not a public figure in such field, it stated a cause of action under the statute protecting the right of privacy if published as part of an advertisement for advertising purposes. In this case the publication of the plaintiff's photograph in connection with the article was unauthorized, 277 App Div 848, 98 NYS2d 300, affg 197 Misc. 921, 99 NyS2d 864 (1950).

Shortly thereafter the Levertons sued the Curtis Publishing company for wrongful invasion of the plaintiff's right of privacy by publication of a photograph of Sue

Leverton as she lay in the street immediately after being struck by an automobile. Two decisions rendered the conclusion that the defendant's publication of the photograph had constituted an actionable invasion of the plaintiff's right of privacy, Leverton v. Curtis Publishing Co., 97 F Supp 181, 192 F2d 974 (CA3, 1951).

It has been determined by the court that even a fictionalization of a story based upon an actual trial, because it is not presented for the purpose of providing genuine information, constitutes a sufficient basis to allege a cause of action for invasion of privacy, Hazlitt v. Fawcett Publications, Inc.,116 F Supp 538 (DC Conn.1953).

Yet printing or broadcasting the true facts of a trial, no matter how unpleasant the information may seem to the object, does not constitute an invasion of privacy even if it involves the name or identity of a rape victim, Cox Broadcasting Corp. v. Cohn, 420 US 469 (1975). As it pointed out by Lindmark and Fishman in Section Two of this chapter, the use of the name of a rape victim and her picture "would have sold more newspapers".

The principle established in the Cox Broadcasting decision was reaffirmed in the similar case of Oklahoma Publishing Co. v. District Court of Oklahoma County. Here the Supreme Court struck down a decision by Oklahoma courts barring three Oklahoma City newspapers from publishing the name and picture of an 11-year-old boy charged in a shooting death. The high court said that an Oklahoma judge abridged freedom of the press by issuing his gag order. The court said the information barred from publication was obtained in a public hearing and could not be supptessed. The judge issued a pre-trial order prohibiting further display, ruling that the boy's right to rehabilitation outweighed any freedom of the press considerations or the public's right to know, __US __(1977).

Immunity from invasion of privacy is not limited to information obtained as part of the court record, however. In a larger sense if the name or likeness is used in connection with any newsworthy item, even without consent, it is likely that there will be no invasion of privacy for purposes of advertising or trade despited the fact that the unauthorized appropriation may very probably increase the circulation of the publication. This can be seen readily in the case of Florida Publishing Company v.

Fletcher. Here an action was brought against a newspaper publisher for damages for alleged trespass, invasion of privacy and for wrongful intentional infliction of emotional distress arising out of the publication of a photograph of the silhouette of the plaintiff's deceased daughter on the floor of the bedroom after a fire at the home of the plaintiff. The plaintiff first learned of the facts surrounding the daughter's death by reading the story and viewing the photographs published in the newspaper. The high court held that the plaintiff could not recover under the theory of trespass, in that there was an implied consent by custom and usage authorizing the photographer's entry into the home under circumstances in which the fire marshall and police officer invited the news media to accompany the marshall and officer in their investigation of a fire. On remand the court held that: "Due to such widespread and longstanding custom, reason and logic support the application of implied consent to enter the premises in the case before us. It, therefore, was not a trespass, and I would affirm the trial court", 340 So 2d 914, 919 (Fla 1977). The trial court had dismissed the count alleging invasion of privacy and granted summary final judgment in favor of the publisher on the counts alleging trespass and emotional distress, see 319 So 2d 100. Hence the court concluded that the facts of the case failed to constitute intrusion for purposes of invasion of privacy in violation of the plaintiff's constitutional right.

Other Uses of Name

In a few cases where defendants made an unauthorized use of the plaintiff's name for advertising purposes, recovery for invasion of privacy has been allowed.

Recovery Allowed

Neyland v. Home Pattern Co., Inc. involved a magazine publisher who used a painter's name without his written consent to induce trade in patterns for a reproduction of one of his paintings by means of embroidering the painter's artistic production in a magazine offering for sale patterns based upon such reproductions. The court found

the publisher liable under § 51 of the Civil Rights Law as amended, e. 501, 65 F2d 363, cert den 290 US 661 (CA2, NY 1933).

In Coleman v. Ted's Auto Sales, Inc. the court held sufficient under the Civil Rights Law a complaint stating that the defendants falsely used the plaintiff's name, reputation and widespread legal talent in the automotive business for the purpose of conveying to those with whom they did business and from whom they sought credit, through published credit reports, the notion that the plaintiff was financially connected with their firm and was responsible for its business policies for the purpose of inducing others, on the strength of the plaintiff's reputation, to impart credit to them, 34 Misc 2d 100, 33 Misc 2d 739, 227 NYS2d 693 (1962).

The case of Hamilton v. Lumberman's Mutual Casualty Company involved a suit to recover for physical pain and suffering, embarrassment, and invasion of the right to privacy as a result of a newspaper advertisement placed by the insurance company in the name of the plaintiff for witnesses to an accident suffered by the plaintiff. The Supreme Court of Louisianna refused to hear the appeal of the insurance company for lack of jurisdiction, transferring it to the Court of Appeals 226 La 644, 76 2d 916 (1954). This court held that the evidence showed that the insured had suffered great mental anguish as a result of the invasion of privacy, but found the sum awarded excessive, 82 So 2d 61 (1955).

Other instances in which recovery has been permitted for advertising or purposes of trade include the following: Thompson v. Tilford, 152 App Div 928, 137 NYS 523 (1912); Kerby v. Hal Roach Studios, 53 Cal App 2d 207, 127 P2d 577 (1942); Adrian v. Unterman, 281 App Div 81, 118 NYS2d 121, affd 306 NY 771, 118 NE2d 477 (1953); Gieseking v. Urania Records, Inc., 17 Misc 2d 1034, 155 NYS 2d 171 (1956); Flores v. Mosler Safe Co., 7 NY2d 276, 196 NYS2d 975, 164 NE2d 853 (1959); Lahr v. Adell Chemical Co.,300 F2d 256 (CA1, Ma 1962); Palmer v. Schonhorn Enterprises, Inc., 96 NJ Super 72, 232 A2d 458 (1967); Canessa v. JI Kislak, Inc., 97 NJ Super 327, 235 A2d 62 (1967).

Recovery Denied

Under varying circumstances recovery failed to ensue despite the use of the plaintiff's name for advertising or trade purposes. In one case it was necessary for the wife to use her former husband's name in an advertisement after their divorce in order to publicize the fact that her business was being changed to another name, Fullerton V. Kennedy, 19 Misc 2d 502, 187 NYS2d 213 (1959).

Another broad area in which recovery is not allowed for the appropriation of one's name even for advertising purposes occurs when the common law right of action is lost as a result of the plaintiff's voluntary use for publication of uncopyrighted material. Once the plaintiff has disseminated such material in connection with his own name and of his own accord, he has no claim against its further dissemination for any reason or purpose Rosenthal v. Kotler, 26 Misc 2d 947, 208 NYS2d 167 (1960).

Still another area in which recovery has been denied in a wide range of cases for the unauthorized use of one's name in advertising involves the sale and/or reuse of names from lists, such as subscription lists or lists of employees, without the consent of the individuals involved. On one such case the court held that claims of privacy violations and deprivations of liberty and protperty under the Constitution concerning a statute authorizing the sale of copies of motor vehicle registration records by the Commissioner of Motor Vehicles, which allegedly led to considerable annoyance and inconvenience from merchandise solicitation through the mails, by telephone and in person, were plainly unsubstantial. The complaint was dismissed, 269 F Supp 880 (SDNY, 1967), 386 F2d 449 (CA2, NY 1967). In Lamont v. Commissioner of Motor Vehicles the court reasoned that the individuals whose names were reused for advertising purpose had no complaint simply because they were required to register their motor vehicles for the same reason that the court rejects the claim that the outraged listeners may invoke the right of privacy or other constitutionally protected interests to shut out radio broadcasts regardless of how noxious they may appear, ibid., 882-883.

That same year the court went a step further in a proceeding on a complaint by the National Labor Relations Board which sought an order compelling our employer to produce personnel and payroll records or eligibility lists containing the names and addresses of all employees eligible to vote in a forthcoming union representation election. The court determined that one of the factors that tend to impede a free and reasoned choice in elections is the lack of information with respect to one of the choices available. The court further concluded that the constitutional right to free association and privacy is not invaded by the removal of this impediment to free choice created by lack of communication. The list simply sets forth the names and addresses of those employed by the defendant. "(I)t tells nothing about their beliefs and associations...(T)hose who do not welcome visits to their homes are free to turn the visitors away and will have the protection of the law in doing so," National Labor Relations Board v. British Auto Parts, Inc., 266 F Supp 368, 373 (CDCA, 1967).

In another action for an injunction restraining the defendant from disclosing or selling licensing and registration information, the court rendered its judgment for the defendant, further reinforcing the precidents mentioned above, Chapin v. Tynan,]58 Conn 625, 264 A2d 566 (1969).

In a more recent case the plaintiff and members of the class which represents subscribed to publications or credit card privileges of the defendant who, without permission, sold, rented or otherwise permitted the names of the plaintiff and the members of the class he represents to be entered into commercial use or distribution to persons not in privity with the publisher whose publication was subscribed for or the credit card company with which the member of the class had a contract. In an action brought to enjoin the publishers and credit card company from selling the subscription lists to direct mail advertisers, the court held that the practice complained of did not constitute an invasion of privacy and that the plaintiff could not adequately represent the interests of the class as a whole. Shibley v. Time, Inc., 40 Ohio Misc. 51 (1974),45 Ohio App 2d 69, 341 NE2d 337 (1975).

Other Uses of Picture

For Display Purposes

In general the use of the plaintiff's picture in advertising displays constitutes an invasion of privacy. Seven years after the passage of the New York statute the US Supreme Court heard an action for the use of a photographed portrait for advertising purposes without first obtaining written consent. The higher court upheld two lower court decisions which issued an injunction against the defendant and awarded damages to the plaintiff, Sperry And Hutchinson Company v. Rhodes, 220 US 502 (1910).

Shortly thereafter a case in which consent was exceeded, Almind v. Sea Beach Ry. Co, involved a violation of the New York Privacy Act because a street railway company, which took a picture of passengers entering and leaving a car and subsequently used it to teach passengers the proper way to enter and alight with safety. The court held that although one passenger had granted his oral consent, it could not replace the written consent required by the statute, supra.

The case of Lane v. FW Woolworth Co. suggests that the use of an actress' picture in a locket sold commercially for the purpose of making lockets more attractive comprised use for advertising purposes or for the purposes of trade within the Civil Rights Law which provides that any person whose portrait is used for advertising purposes or purposes of trade, without his written consent, may recover damages for injuries resulting from such unauthorized use, regardless of the fact that in this case it was printed on the back of the pictures thus allowing the buyer to replace the picture with a photograph more suited to his preference, 171 Misc 66, 11 NYS2d 199 (1939).

In a case whereby defendants published a handbill containing the plaintiff's photograph and name as part of a union membership drive, for the purpose of financial gain, and as an advertisement, the court held that a cause of action had been sufficiently stated, Rubino v. Slaughter, 136 NYS2d 873 (1954).

Other cases comprising an invasion of privacy for the display or other use of the plaintiff's picture for advertising purposes include the following: Kunz v. Bosselman, 131 App Div 288, 115 NYS 650 (1921); Munden v. Harris, 153 Mo App 652

(1911); Harris v. HW Gossard Co., 194 App Div 688, 185 NYS 861 (1921); Bennett v. Gusdorf, 101 Mont 39, 53 P2d 91 (1935); McCreery v. Miller's, 99 Colo 499, 64 P2d 803 (1936); Fisher v. Murray M. Rosenburg, Inc., 175 Misc 370, 23 NYS2d 677 (1940); Young v. Greneker Studios, 175 Misc 1027, 26 NYS2d 357 (1941); Eliot v. Jones, 66 Misc 95, 120 NYS 989 (1910); Olan Mills, Inc. v. Dodd, 234 Ark 495, 353 SW2d 22 (1962); Canessa v. JI Kislak, Inc., 97 NJ Super 327, 235 A2d 62 (1967); Fisher v. Murray M. Rosenberg, Inc., 175 Misc. 370, 23 NYS2d 677 (1940).

In 1902 the display of a plaintiff's picture was held above any cause of action for the invasion of privacy in Roberson v. Rochester Folding Box Co., supra. While the passage of the Civil Rights Law shortly thereafter attempted to establish the constitutional right of privacy, many expectations to both statutory and common law have occurred since that time. A few such cases are listed as follows: Martin v. FIY Theatre Co., 10 Ohio Ops 338, 26 Ohio L Abs 67 (1938); Harlow v. Buno Co.,36 Pa D & C 101 (1939); O'Brien v. Pabst Sales Co., 124 F2d 167, cert den 315 US 823 (CA5, Tex 1941); Toscani v. Hersey, 271 App Div 445, 65 NYS2d 814 (1946).

In Newspapers or Other Printed Publications

In a number of cases the use of the plaintiff's picture in a newspaper or other publication for advertising or trade purposes has been held to comprise an invasion of privacy. For example, while the photographic reproduction of a plaintiff in a newspaper cartoon with statements indicating that the plaintiff had come from the country and "made good" was held by the court to be not libelous in the absence of special damage, the court did find libel in the selling for reproduction in other newspapers a cartoon published without the consent of the plaintiff based upon the New York Privacy Law, McNulty v. Press Pub. Co.,136 Misc 833, 241 NYS 29 (L930).

In the case of Griffin v. Medical Soc. of State of New York, the plaintiff alleged that he was treated by two physicians who took certain photographs which were used under the title of "The Saddle Nose" for purposes of advertising and trade when

published as "before and after" treatment in a widely distributed journal. The court denied the defendant's motion to dismiss the complaint on the basis of insufficient evidence, 7 Misc 2d 549, 11 NYS2d 109 (1939).

One of the few cases in which the court found for the plaintiff of both counts of libel and invasion of privacy is that of Pittera v. Parade Publications, Inc. Here the court concluded that a complaint for libel charging the defendant's publication of an erroneous statement that the plaintiff had been married to a well-known executive and had terminated their relationship by divorcing him and marrying another stated as a cause of action where details of the entire article exposed the plaintiff to contempt. Furthermore the court determined that the complaint for violation of the Civil Rights Law by unauthorized use of the plaintiff's photograph was sufficient as presenting a jury question concerning whether the photograph in connection with the entire article was used for purposes of trade, 29 Misc 2d 90, 216 NYS2d 162 (1961). It should be noted, however, that this decision was ultimately reversed, which properly places the final disposition of this issue in the section that immediately follows, 30 Misc 2d 706, 219 NYS2d 998, 15 Ad2d 882, 225 NYS2d 487 (1962).

Several additional cases suggest instances in which the use of the plaintiff's picture in a newspaper or similar publication for advertising purposes has been held unacceptable. They are: Almind v. Sea Beach R. Co.,157 App Div 230, 141 NYS 842 (1913);Riddle v. Mac Fadden,116 App Div 353, 101 NYS 606 (1906), 201 NY 215, 94 NE 644 (1911); Fitzsimmons v. Olinger Mortuary Asso., 91 Colo 544, 17 P2d 535 (1932); Fisher v. Murray M. Rosenberg, Inc., 175 Misc 370, 23 NYS2d 677 (1940); Korn v. Rennison, 21 Conn Supp 400, 156 A2d 476 (1959); Metzger v. Dell Pub. Co., 207 Misc. 182, 136 NYS2d 888 (1955); Gautier v. Pro-Football, Inc., 304 NY 354, 107 NY2d 485 (1952); Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc 2d 1, 294 NYS2d 122 (1968); Pagan v. New York Herald Tribune, 32 AD2d 341, 301 NYS2d 120, affd 26 NY2d 941, 310 NYS2d 327, 258 NE2d 727 (1969).

A substantial number of cases have also suggested the converse: That the use

of the plaintiff's picture for purposes of advertising or trade in a newspaper or other publication fails to constitute an invasion of privacy. The first such decision was rendered in 1902 when the court heard the case of Roberson v. Rochester Folding Box Co., supra.

Largely resulting from this decision, the New York Civil Rights Law on privacy was quickly passed. In one of the early interpretations of this statute the court concluded that the use of any person's picture or portrait without his written consent for advertising purposes, or for purposes of trade, so as to warrant an injunction against such use, must be used for the dissemination of information, or for commerce or traffic. Jeffries v. New York Evening Journal Pub. Co., 67 Misc 570, 124 NYS 780 (1910).

Likewise an actress has no right of action under this section of the law for the publication of her portrait in a weekly magazine where it is shown that such picture is not used for advertising purposes merely because the magazine contains a number of advertisements. Colyer v. Richard K. Fox Pub. Co., supra.

In the case of Murray v. New York Magazine Company the plaintiff brought an action pursuant to section 51 of the Civil rights Law to recover damages for an alleged invasion of privacy arising out of the defendant's unauthorized use of the plaintiff's photograph on the cover of an issue of New York magazine, which is published and distributed by the defendant. The court felt that a picture illustrating a matter of public interest is not considered to be used for advertising purposes or trade purposes within the prohibition of the Civil Rights Law unless it has no real relationship to the article, or unless the article is an advertisement in disguise.

Here, the court held that where a plaintiff was singled out and photographed because his presence in Irish garb constituted visual participation in St. Patrick's Day festivities, publication of his photograph on the magazine cover was in connection with the presentation of matter of legitimate public interest to readers, and bore a reasonable relationship to the presentation. Therefore, it was not a sufficient

infringement to be considered actionable as having been used for the purpose of advertising or trade within the prohibition of the Civil Rights Law, 27 NY2d 406, 267 NE2d 256 (1971).

Similarly it had been determined earlier that the use of one's name or picture in a newspaper, magazine, or newsreal, in cinnection with items of news, or one that is newsworthy, is not a use for advertising or trade within the Civil Rights Law but that an individual cannot be singled out and unduly featured merely because he is on the scene. Gautier v. Pro-Football, Inc.,304 NY 354, 107 NE2d 485 (1952).

Finally the court held that the defendant's publication and exhibition of a story and photograph which accurately portrayed events underlying the death of the plaintiff's children who suffocated when they trapped themselves in a refrigerator located in the family home were not actionable on the theory of invasion of privacy under the Civil Rights Law because the subject matter within the area of legitimate public interest. Costlow v. Cusimano, 34 AD2d 196, 311 NYS2d 92 (1970).

A picture illustrating an article on matters of public interest is not considered to be used for advertising or trade purposes as prohibited by the Civil Rights Law unless it has no real relationship to the article to shich it refers or unless the article is an advertisement in disguise. LaForge v. Fairchild Publications, Inc., 23 Ad2d 636, 257 NYS2d 127 (1965).

Other cases which further set forth a theory for determining when the use of a plaintiff's picture for advertising purposes in a newpaper or other publication falls short of comprising an invasion of privacy are as follows: Stern v. Robert R. McGtide & Co., 159 Misc 5, 288 NYS 501 (1936); Pallas v. Crowley-Milner & Co.,334 Mich 282, 54 NW2d 595 (1952); Oma v. Hillman Periodicals, Inc., 281 App Div 340, 118 NYS2d 720 (1953); Johnson v. Boeing Airplane Co.,175 Kan 275, 262 P2d 808 (1953); Albert v. New York Telephone Co.,28 Misc 2d 296, 204 NYS2d 36, affd 11 App Div 656, 203 NYS 1019 (1960); Siequel v. Esquire, Inc., 4 App Div 2d 477, 167 NYS2d 246 (1957); Dabbs v. Robert S. Abbott Publishing Co., 44 Ill App 2d 438, 193 NE2d 876 (1963); Martin v. Senators, Inc., 418 SW2d 660 (1967); Wendell v. Conduit Mach. Co.,

74 Misc 201, 133 NYS 758 (1911); Toxcani v. Hersey, 271 App Div 445, 65 NYS2d 814 (1946); Dallesandro v. Henry Holt & co., 4 AD2d 470, 166 NYS2d 805, appeal conditionally dismissed 7 NY2d 735, 193 NYS2d 635, 162 NE2d 726 (1957); Klein v. McGraw-Hill, Inc., 263 F Supp 919 (DCDC, 1966); Murray v. New York Magazine Co., 27 NY2d 406, 318 NYS2d 474, 267 NE2d 256 (1971); Negri v. Schering Corp., 333 F Supp 101 (DCNY, 1971); Grant v. Esquire, Inc., 367 F Supp 876 (DCNY, 1973); McGraw v. Watkins, 49 AD2d 958, 373 NYS2d 663 (1975); Wallace v. Weiss, 82 Misc 2d 1053, 372 NYS2d 416 (1975).

On Television or in Motion Picture

The use of one's picture for advertising or trade purposes, without consent, either on television or in the theatre, may be sufficient to warrant an actionable claim for invasion of privacy.

In the case of Binns v. The Vitagraph Company of America a plaintiff, as a wireless telegrapher, had performed acts of great heroism by remaining at his post during a collision between steamships at sea, in which many lives were imperiled. He had refused to allow himself to be publicly exploited as a hero. Nevertheless, the defendant employed an actor to impersonate the plaintiff in scenes representing the disaster, and exhibited photographs so obtained as moving pictures, showing the person representing the plaintiff in ludicrous attitudes, etc. In this case the jury decided that a verdict of $12,000.00 is not excessive. 147 App Div 783, 132 NYS 237 (1911). On appeal the judgment was affirmed with costs, 210 NY 51, 103 NE 1108 (1913).

William L. Prosser believes the classic case for recovery for this aspect of privacy invasion has been Melvin v. Reid. Here Gabrielle Darley, a prostitute, had been tried for murder and acquitted in a famous case. She subsequently married, left the state and "thereafter at all times lived an exemplary, virtuous, honorable and righteous life". The defendant produced and released a movie entitled "The Red Kimono" based upon the plaintiff's experiences, using her true maiden name and advertising the film to be a true account, 112 Cal App 285, 297 (1931). Subsequent litigation raises several questions concerning the contemporary application of this case.

Would that this holding be justified in light of Cox Broadcasting V. Cohn Case, supra? Would this holding be justified if the marriage record was a public record? Would this holding have been different if the defendant had publicized the married name of the plaintiff rather than her true maiden name? Would it make any difference if the defendant had identified the plaintiff further by disclosing where she now lived?

In the case of Blumenthal v. Picture Classics, Inc. the plaintiff sued under the Civil Rights Law for an injunction to restrain the defendants from unlawfully exhibiting her picture for trade purposes. Without her consent the defendants had sold and distributed motion pictures of her, depicting her in the act of selling bread and rolls to passersby. These pictures were shown on the screen of various local theatres. The court found the plaintiff entitled to the relief allowed, and the order was affirmed with costs, 235 App Div 570, 257 NYS 800 (1932), 261 NY 504, 185 NE 713 (1933).

The case of Freed v. Loew's Incorporated involved an action in which the plaintiff posed as a sailor being depicted by an artist on world war service recruiting posters, and the artist made such improvements in the physique or features as were deemed desireable on the poster. More than twenty years later the defendant produced a motion picture entitled "Thunder Afloat", having the cooperation of the Navy Department. The pictured story showed ficitious scenes of operations by the US Navy in World War I, especially in respect to the menace of U-boat submarine warfare. The poster appears as part of the dressing for a navy recruiting office and is carried upon nine feet of film which are shown for six seconds of the 94 minute run. The sailor figure depicted resembles the plaintiff. His friends readily recognized him. Citing Binns v. Vitagraph Co., supra., the court held that the result cannot be regarded as a portrait or picture of the plaintiff within the meaning of the Civil Rights Law, 175 Misc 616, 24 NYS2d 679 (1940).

In the case of Gautier v. Pro-Football, Inc. it was determined that a person travelling upon public highways may expect to be televised, but only as an incidental part of a genreral scene, and a person attending public events may be expected to be

televised in the status in which he attends. As a mere spectator he may be taken as part of the general audience, but he may not be picked out of the crowd alone, thrust upon the screen and unduly featured for public view. However, where one is a public personage, an actual participant in a public event, or where some newsworthy incident affecting him is taking place, the right of privacy is not absolute, supra.

In 1954 a case arose out of a showing in Salt Lake City, Utah, of the movie "Look for the Silver Lining" which was a musical show based on the life story of Marilyn Miller and her rise to fame in vaudeville and musical comedy during the first two decades of this century. Secondarily, the motion picture portrayed the life of Jack Donahue, also a famous singer, dancer and comedian of that era who in fact did co-star with Marilyn Miller in two famous broadway productions.

Plaintiffs, the widow and daughters of Jack Donahue, sued the defendants for damages and an injunction on the basis of a Utah statute. On appeal the court held in accord with the trial decision declaring judgment that the semi-fictional portrayal of Jack Donahue was not for purposes of trade within the meaning of the prohibition contained in the state law, Donahue v. Warner Bros. Pictures Distributing Corp., 2 Utah 2d 256, 272 P2d 177 (1954).

In the case of Bernstein v. National Broadcasting Company, the court held that where prosecution for murder had been given considerable publicity by newspapers and magazines from the time of trial until the accused's conditional release from imprisonment eight years later, did not invade his privacy. It was also decided that a radio program, which told his story sixteen years later, or a television program which did so twenty years later, basing the broadcast upon the plaintiff's past life (yet in no way identifying him by use of his name or by advertisements of the program) did not effectively invade, 129 F Supp 817 (DCDC, 1955), affd 232 F2d 369 (1956).

It was later decided that the use of a person's name in a picture which is part of a sponsored television program does not ipso facto comprise use for advertising purposes as prohibited by the Civil Rights Law unless the name is exploited in commercial announcements or in direct connection with the product itself, Fleischer v. WPIX, Inc.,

30 Misc 2d 17, 213 NYS2d 632 (1961).

The case of Youssoupoff v. Columbia Broadcasting Systems, Inc. rendered the recent holding that there may be no recovery under the Civil Rights Law for the use of a person's name or photograph in connection with an article of current news or immediate public interest, and that this rule is applicable to television broadcasts, 41 Misc 2d 42, 244 MYS2d 701, affs 19 AD2d 865, 244 NYS2d 1 (1963).

Nevertheless, the unauthorized use of the name and photograph of a plaintiff, the television personality of "What's the Story, Jerry" fame, would not be permitted or condoned under the Civil Rights Law. The court determined that such use was, in effect, a theft of valuable property right that the plaintiff had labored mightily to create, Rosenberg v. Lee's Carpet & Furniture Warehouse Outlet, Inc.,

In the summer of 1977 the Supreme Court ruled that the First Amendment does not protect a television station from being sued for damages by a"human cannonball" if it broadcasts his entire performance as a news item without his consent. The scope of the decision may prove narrow, however, because it involved a "performance" lasting only fifteen seconds. Nevertheless, a broadcaster who films or tapes a performer's entire act and then airs it without permission even on a news program, may be subjecting the station to a damage suit. Such a broadcast poses a threat to the value of the performance, and the Constitution is not necessarily a protection for the broadcaster involved. In this case the action involved a film clip of Hugo Zacchini, the self-styled "human cannonball", hurtling 200 feet through the air into a net at an Ohio fairgrounds, Zacchini v. Scripps-Howard Broadcasting Company, ___US___(1977).

Other cases involving the use of the plaintiff's picture for advertising or trade purposes, without authorization, on television or in the motion pictures, include the following: Kunz v. Allen, 102 Kan 883, 172 P 532 (1918); Sherwood v. McGowan, 3 Misc 2d 234, 152 NYS2d 658 (1956): Durgom v. COlumbia Broadcasting System, Inc., 29 Misc 2d 394, 214 NYS2d 752 (1961); Smith v. WGN,Inc., 47 Ill App 2d 183, 197 NE2d 482 (1964); Reilly v. Rapperswill Corp., 50 AD2d 342, 377 NYS2d 488 (1975).

Program Privacy

Program privacy is a relatively new issue because of the inexpensive availability of videotape recording equipment. The burgeoning technology of cable television presents new legal problems which have not yet been defined fully. Hypothetically a cable operator could videotape a program broadcast by a station which his system is receiving, and then he may show the program over the station, providing the service to his viewers which may attract additional subscribers. Clearly this is a performance for profit.

Recent state laws are now being tested on this question, as are federal regulations. For example two cases have limited the distance signals may be carried within the CATV market area. Teleprompter Cable Communications v. FCC, ___F2d___(CADC 1977); Treasure Valley CATV Committee v. US, ___F2d___(CA9 1977). The effective role in public policy making should be to project potential legal problems and avert their consequences. In this sense perhaps it should be incumbent upon the judgment of state legislatures to pass laws prohibiting CATV from transmitting any network or station programming without the permission of the broadcasting corporation involved. If the courts will uphold such laws, the integrity of program privacy should be protected.

Another potential illegal practice could be the insertion of local commercials on a popular television program in substitution for the broadcast station or network commercials. What this means is that a local advertisor can receive the benefits of advertising on a network program without paying network rates and indeed reaching his local target audience. The cable system operator could collect a fee for the sale of this time. Again, this is clearly a performance for profit. There is no existing regulation specifically prohibiting these practices, but legal precedents from copyright cases will hold as well as the precedent set forth in the landmark tape piracy case of Goldstein et al. v. California, 412 US 546 (1973).

Cable television systems developed as a direct result of consumer demand for clearer television reception and more viewing options than were made available under the frequency-allocation system. The first cable television system began service to Mahanoy City, Pennsylvania, in 1948. Federal regulation of cable television services began for the most part in the early 1960's. The statutory basis for regulation by the FCC is section 303(g) of the Communications Act of 1934, which formulates the structure for the commission "to promote the wider and more effective use of radio". The Commission has the authority under this act to adopt rules and regulations as "reasonably ancillary" to its regulation of television broadcasting. In 1972 the Supreme Court affirmed regulations requiring cable television systems to originate certain kinds of programming as reasonably ancillary to the commission's general obligation to promote diversity. United States v. Midwest Video Corp., 406 US 649, 662-63 (1972).

Mistaken Usage of Picture

Where a defendant uses a plaintiff's picture in its advertisement by mistake, there may be sufficient grounds for an invasion of privacy. Such was the case in Flake v. Greensboro News Co., which involved the unauthorized publication of a photograph of a radio enrertainer in connection with a bread advertisement and an advertisement for a stage show. In light of the publisher's public apology to the entertainer, which included desisting from the use of the photograph, and in the absence of malice and proof of special damages, the plaintiff was entitled to recover nominal damages only for violation of her right of privacy, supra.

In the case of Emanuel v. Free Lance Photographers Guild, Inc., the court continued its liberal interpretation of events in holding that the plaintiff was not entitled to damages where the defendants had sold the plaintiff's photograph in good faith and in honest belief that it was a photograph of another woman, from whom they had obtained for a consideration a release to sell it, 28 Misc 2d 503 219 NYS2d 626 (1960).

The reluctance of the court to hold against the defendant for the mistaken use of another's picture was probably most conspicuous in one of the earliest cases considered. When a defendant published in its newspaper an advertisement for "Duffy's Pure Malt Whiskey", stating that the use of this product was indorsed by one while printing the picture of another, recovery was denied on the ground that the defendant, as printer and distributor of the advertising material, did not mistakenly publish the picture with the demonstrative malice that would be necessary to obtain the conviction desired by the plaintiff, Peck v. Tribune Co., 154 F 330, revd on other grounds 214 US 185 (CA7, 1907).

It is possible, however, for a plaintiff to win an action for the unauthorized publication of her likeness in a newspaper advertisement. Such was the case when an advertisement included a picture of "Lustre-Color Home Hair Coloring", various matter describing it, a form for ordering it, and a reproduction of a photograph of the plaintiff above the following language: "Miss Elgie Sprague, Lustre-Color authority from New York, will be in Rich's Drug Department, street floor...to advise you on your correct Lustre-Color shade". The court held that such an advertisement could not be published once the employee used in such advertisement had been terminated by her employer, Colgate-Palmolive Company v. Tullos,219 F 2d 617 (CA5, 1955). The court found that when the plaintiff's continued employment had been discouraged by the defendant, it was too late to remove the relevant advertisement from the publication. Nevertheless, the defendant's "negligent haste in changing the advertisement, which warranted an inference of malice toward the (plaintiff) or wanton disregard of her right's", constituted sufficient unauthorized use of the plaintiff's portrait for

commercial purposes to warrant a jury verdict for the plaintiff, ibid.

Usage of Name or Likeness in False Light Misrepresenting Authorship or Statements

Closely related to the sections on "Indorsement of Products or Services" and "Usage of Name or Likeness to Increase Circulation of Publication" is the ultimate abuse of these objectives. It represents the unjustifiably extreme attempt to pursue these goals not only without the consent of the plaintiff, but without proper representation of the plaintiff's authorship of an article or statements attributed to him.

For the case of Thompson v. GP Putnam's Sons, described in the section on the "Indorsement of Products or Services", suggests this issue is virtually a closed question. In this case, it was alleged that Putnam published and circulated, and is continuing to publish and circulate, a book entitled "Memoirs of a Woman of Pleasure", containing an "Introduction" and "Note" which are intended to increase the sales of the book by making it appear to be a work of recognized literary merit. It contained language implying that the plaintiff, as literary critic, regarded the book as having such literary merit, whereas his true opinion was that it was tedious and bewildering. The court held this use of plaintiff's name and statement to be sufficient evidence for the rejection of the motion to dismiss the plaintiff's complaint, supra.

The court further concluded that altering a plaintiff's research paper so as to suggest that he recommended a substance on which the defendants owned a patent rather than the substance with regard to which the plaintiff physician had conducted research did not render the article libelous per se when published under the plaintiff's name, but it did comprise a sufficient cause of action for violation of the Civil Rights Law as a conspiracy to invade the plaintiff's right of privacy, Ravich v. Kling, 17 Misc 2d 683, 187 NYS2d 272 (1959).

The case of Sperry Rand Corporation v. Hill involved an action by a physician against an electric shaver manufacturer for libel and invasion of privacy on the basis

of its distribution of reprints of a magazine article allegedly stating falsely that the plaintiff was one of its authors and containing remarks favorable to the defendant. On appeal the court vacated the judgment and set aside the general verdict which held that no invasion of privacy existed, that the libel question was an issue for the jury, and that no punitive damages should be imposed. The appeal's court asked for another trial to determine the compensatory damages for libel, 356 F 2d 181 (CA5, 1966).

Other cases related to the question of misrepresentation are as follows: D'Altomonte v. New York Herald Co., 208 NY 596, 102 NE 1101, rodg 154 App Div 453, 139 NYS 200 (1913); Kerby v. Hal Roach studios, 53 Cal App 2d 207, 127 P2d 577 (1942); Manger v. Kree Institute of Electrolysis, Inc., 233 F2d 5 (CA2, 1956); Brociner v. Radio Wire Television, Inc.,15 Misc 2d 843, 183 NYS2d 743 (1959).

Alteration of Picture

Most invasions of privacy involving the usage of name or likeness for advertising or trade purposes occur without the consent of the plaintiff. When the plaintiff authorizes the use of his picture for such purposes, making a substantial change or alteration in the published version of the picture may exceed the consent and therefore be actionable under the Civil Rights Law or its common law equivalent. In Freed v. Loew's Incorporated,however, it was found that minor distortions may be allowable so long as the portrayal essentially represents the image it was intended to depict, supra.

Consistent with this philosophy the court found in an action by a motion picture actress against a motion picture company alleging libel and violation of her right of privacy that the case should be dismissed. Dahl v. Columbia Pictures Corporation involved sketches which are used in connection with advertising a photoplay and giving the impression that the character which the actress portrayed was wild and sexually promiscuous. The court decided that the portrayal did not produce an evil opinion of the actress in the minds of right thinking people regardless of whether they felt the

role she played was in poor taste, and that the sketches were not actionable by the actress as libel inasmuch as they were based on actual scenes and brought out the main theme, even if exaggerated ,of the photoplay and were within permissable limits of motion picture advertising to be unlawful by the last section, the jury, in its discretion, may award exemplary damages.

Section 52 prohibits the television, broadcasting or taking motion pictures of certain proceedings: "No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this statute of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency, or other tribunal in this state; except that the prohibition contained in this section shall not apply to public hearings conducted by the public service commission with regard to rates charged by utilities, or to proceedings by either house of the state legislature or committee or joint committee of the legislature or by a temporary state commission which includes members of the legislature, so long as any testimony of witnesses which is taken without resort to subpoena or other compulsorary process". The Act specifies the conditions as requiring the president or speaker of the assembly , committee or commission, and the witness testifying to offer their consent in keeping with the philosophy that it is in the public interest to permit the televising, broadcasting or taking of motion pictures of such events. standards, 12 Misc 2d 574, 166 NYS2d 708 (1957), affd 7 App Div 2d 969, 183 NYS2d 992 (1959).

While the court felt that alterations of the plaintiff's appearance could be made provided that they are insubstantial, the court further held that such alterations could be made where the photograph as published did not indicate to the public that it was one of the plaintiff, even though a small group of neighbors, friends, and relatives of the plaintiff, familiar with him and with the circumstances in which the photograph had been taken, recognized him as the person depicted therein, Brauer v. Globe Newspaper Co., 351 Mass. 53, 217 NE 2d 736 (1966).

It is also true that if a model signs a release for the unrestricted use of a picture, any oral agreements regarding the use of that picture become irrelevant despite the fact that they may conflict with the objectionable, altered use of the picture along with suggestive captions. Witnesses to the oral agreement were held by the court to be equally irrelevant in the case of Russell v. Marboro Books, 18 Misc 2d 166, 183 NYS2d 8 (1959).

Other cases involving alteration of the plaintiff's picture include the following: Loftus v. Greenwich Lithographing Co., 192 App Div 251, 182 NYS 428 (1920); Sinclair v. Postal Tel. & Cable Co., 72 NYS2d 841 (1935).

Conclusion

As has been implied throughout this section, the New York Civil Rights Law serves as the model statute on the invasion of privacy. Because it was the first, and because of the amount of advertising business in New York, it has been subject to more test cases than any other statute of its kind. Naturally more applications of this subject have been made here than in any other state.

Section 50 of this Act sets forth its objective cogently: "A person, firm or corporation that uses for advertising purposes, or for trade purposes, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor". Here the right of privacy is established. The various ramifications of this right have been delineated above.

Section 51 of this Act further develops the measures which allow action for injunction and for damages when it has been determined that this right has been invaded. In this section it is stipulated that: "Any person whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also

sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury in its discretion, may award exemplary damages."

In section fifty-two of the New York Civil Rights Law, a prohibition versus media broadcast or filming of procedures relating to the testimony of subpoenaed witnesses exists. Specifically, to prevent the unnecessary and unfair defamation of primary or secondary individuals, subpoenaed testimony given before courts, commissions, committees, or other such constituted tribunals shall not be so broadcast or filmed. Exceptions to this rule essentially concern testimony given before public service commissions, such as those regarding the operation of public utilities; legislatures, where testimony concerns the effective operation of government; and temporary state commissions, insofar as they are partly comprised of legislators, as they relate to similar governmental operations and the public interest.

In all such cases, where the Civil Rights Law allows broadcast or film rights, the agreement of the tribunal or assembly leader and that of the witness is to be obtained by the media representatives. Essentially, the objective of the law, and specifically this particular section, is to balance the public's presumed right to know and the privacy and reputation of the witnesses.

Further similarities exist among false light, and appropriation and defamation. In the case of Hinish v. Meier & Frank Co., the plaintiff's name without his consent was signed to a telegram to the governor urging defeat of certain legislation, 116 Ore 482, 113 P2d 438 (1941). "The use of plaintiff's name or picture in advertising without his consent may also often present this form of grievance as well as appropriation. The analogy here, is of course, to defamation, and the overlap might have been thought substantial enough to make an approach via privacy superflous. It appears, however, that courts are finding it more congenial to assimilate defamation cases to privacy". Kalven, 31 Law and Contemporary Problems 326 (1966). It would seem some-

what difficult, however, to merge two torts universally when truth is a defense in one and not in the other.

The latter thesis was reinforced in the case of Cantrell v. Forest City Publishing Co. which applied the New York Times v. Sullivan standard: "with knowledge that a defamatory statement was false or with reckless disregard of whether it was false or not", supra. In the Cantrell case the court explained that: "As so defined, 'actual malice' is a term of art, created to provide a convenient shorthand for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers... In a false-light case, common-law malice-- frequently expressed in terms of either personal ill will toward the plaintiff or reckless disregard or wanton disregard of the plaintiff's rights-- would focus on the defendant's attitude towardthe plaintiff's privacy, not towards the truth or falsity of the material published," 419 US 245 (1974).

With the exception of truth, however, privileges are common to both invasion of privacy and defamation of character. The judicial proceeding similarity was related to privacy and defamation in the case of Cox Broadcasting Corp. v. Cohn: "The developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings. The Warren and Brandeis article... noted that the proposed new right would be limited in the same manner as actions for libel and slander where such a publication was a privileged communjnication: 'the right to privacy is not invaded by any publication made in a court of justice...and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege,'" supra. Such a privilege against invasion of privacy was clearly accorded in the Cox Broadcasting and Oklahoma Publishing Co. v. District Court of Oklahoma County cases, supra, as it was employed successfully as a defense against liability for defamation of character in the case of Irwin v. Ashurst, 158 Or 61, 74 P2d 1127 (1938).

In the case of Rosenblatt v. Baer, Justice Douglas took the position that it

did not matter whether the individuals involved were public or private, but rather"... whether a public issue not a public official, is involved." 383 US 75 (1966). Courts struggled with variations of this theme for the following eight years before the high court ruled on the issue in the case of Gertz v. Robert Welch, Inc., and rejected it, supra.

Other cases have established that false light and defamation are not generically different, as can be seen in Zbyszko v. New York American, Inc.,228 App. Div. 227, 239 NYS 411 (1930), and John-Frederics, Inc. v. Abraham & Strauss, Inc., 39 NYS2d 979 (1942), 53 NYS2d 658 (1942), 53 NYS2d 658 (1945). Other cases have involved conviction for both libel and privacy, such as that of Martin v. Johnson Publishing Co., 157 NYS2d 509 (1956). Still others involving successful causes of action for both libel and privacy include Holmes v. Underwood & Underwood, supra. The examples above are instances in which the name or likeness of the plaintiff has been used for purposes of advertising or trade.

In the section describing the use of name or likeness for purposes of advertising or trade as invasion of privacy and defamation, when both causes of action were raised, cases which involved conviction for invasion of privacy include: Flake v. Greensboro News Co., supra, Holt v. Columbia Broadcasting System, Inc., supra, Thompson v. GP Putnam's Sons, supra, McNulty v. Press Pub. Co., supra, Ravich v. Kling, supra, Pavesich v. New England Life Ins., supra, Binns v. Vitagraph Co., supra.

In other cases action was brought for invasion of privacy only, which failed, when stronger causes of action for libel may have existed but were not raised. Such cases include: Rand v. Hearst, supra, Callas v. Whisper, Inc., supra, Kerby v. Hal Roach Studios,Inc., supra, and Cabanniss v. Hipsley, supra.